Background documents
Exploring strategies for transnational litigation: the case of Palestine

Round Table
14 – 15 December 2015

Public Debate
14 December 2015
Palestinians and the Israeli Court System: Litigating Violations of International Humanitarian and Human Rights Law before Israeli Courts.
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9. Yesh Din; The Ciechanover Report – Dodging the Criminalization of War Crimes and Practical Steps towards Implementation - position paper, October 2015. The Ciechanover Commission was appointed to review and implement the recommendations of the Türkél commission (No.5 in the
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12. International Criminal Court, Office of the Prosecutor; Report on Preliminary Examination Activities for 2015, Excerpt: The section on Palestine includes the procedural history of Palestine’s accession to the ICC on 2 Jan.2015, leading to the opening of a preliminary examination by the Prosecutor’s Office, a very brief sketch of events in Palestine since June 2014 and an account of how the Office of the Prosecutor has been conducting the examination so far.

13. Israeli (Torts) State Liability Law (1952) with Amendment 7 (2005). This is the Law regulating the extent of Israel’s liability to pay compensation to persons injured by actions of the Israeli security forces. The operative article for the purposes of this public debate and reader is Article 5c which has here been amended to broaden the scope of exclusions.

14. Al Mezan; No Reparations in Israel for Palestinians: How Israel’s Amendment No.8 Leaves No Room for Recourse, July 2015. This Comment explains the effect of Amendment No. 8 (2012) of the Israeli (Torts) State Liability Law (No.12 in the reader). The Amendment widens - once again - the category of situations which preclude the possibility of compensation claims being brought against the State of Israel.
This reader presents a selection of documents, from among the many publicly available, on the legal situation of Palestinians living under Israeli occupation. The Introduction explains the background to the uniquely obscure legal context within which Palestinians must operate in their pursuit of legal redress for harm suffered, whether in the context of armed conflict or due to administrative measures imposed by Israel in the occupied West Bank, or to conditions imposed by the blockade of Gaza, ongoing since 2007. The reports and articles focus on legal and practical obstacles to access to justice - an indispensable element of the right to reparations for civilians who suffer violations of human rights. They cover a period (2008 – 2015) in which the investigative procedures and practices of Israel’s military advocate general and military court system have repeatedly come under critical scrutiny from national and international observers. Israel has responded by instigating a public commission of inquiry (the ’Turkel Commission’) and several follow up reports on the implementation of that Commission’s recommendations. In the light of the recent accession of Palestine to the Rome Statute of the International Criminal Court, Israel’s willingness and ability to conduct investigations and prosecutions into alleged international crimes may become the subject of detailed examination. Included also is the report of a conference held at Birzeit University in 2013, in which legal experts proposed rethinking the situation of the Palestinians using other legal paradigms than that of occupation. Among others, the law pertaining to apartheid and the right to self-determination were considered.
Palestinians residing in the West Bank live in a situation of prolonged occupation that is virtually unique in the world today. While Israel’s occupation of Gaza officially ended in 2005, the residents of Gaza have lived under a land and sea blockade involving Israeli control of all border crossings by people and goods since 2007. Legal options open to Palestinians living in both areas are heavily circumscribed by the nature of the military occupation and the physical obstacles to free movement within the West Bank and between Israel and the Palestinian territories.

Political relationship and borders

The dissimilar histories of the two peoples who share Israel and Palestine today and the highly specific circumstances in which the Jewish State of Israel emerged from the ruins of WWII are among many factors that have contributed to a profoundly asymmetrical political relationship between them. The two-State solution, envisaged at various points from 1937 on, and much-favored by the United Nations since the 1970’s, has never eventuated and the borders between Israel and the split territories nominally under Palestinian control remain disputed. The boundary line known as the ‘green line’ marked a non-permanent demarcation agreed upon following the Arab-Israeli war of 1948. In the 1967 ’six-day war’ Israel extended its control beyond the green line (as well as into the East Jerusalem - then under Jordanian rule - the Gaza strip, the Sinai desert (Egypt) and the Golan heights (Syria)).

Citing the temporary status of the ‘green line’ Israel disputes today that it ‘occupies’ the West Bank, or indeed that it has effectively annexed East Jerusalem: it observes that these areas were not within the possession of any other sovereign State immediately prior to Israel’s westward and eastward expansion, and therefore cannot be under ‘occupation’. While the UN among other international observers emphatically consider Israel to be in occupation of the West Bank, the legally undetermined status of the border has allowed Israel to make many unilateral moves to exercise control of various kinds in the territory, which it justifies mostly with reference to the need to protect its citizens from hostile attack from Palestinian territories. The Israeli government refers to the occupied West Bank as the districts of Judea and Samaria.

Meanwhile on the ground – literally - there is by now the incontrovertible border created by the concrete separation wall, begun in 2000 and presently extending some 500 kms. The barrier approximately follows the green line but extends at many locations well into the Palestinian side of that line. Other less visible borders within the occupied West Bank have been created by the division of the territory under the Oslo II Accord of 1995 – Annex I. Under this agreement Israeli exercises varying degrees of administrative, legal and security control over large areas of the West Bank. To its west, Israel has blockaded the Gaza Strip since 2007 following the election of Hamas to political leadership of the area. A series of wars, the most recent in August 2014, has both reflected and maintained constant high levels of tension between the two populations and repeatedly reduced large parts of Gaza to rubble. The death toll among civilians, an ongoing tragedy on both sides, consistently reflects the immense inequality of the respective powers and resources of the fighting parties. In the most recent war, civilian casualties in Gaza outnumbered Israeli casualties by approximately 30:1.
Legislative and Judicial Infrastructure

The asymmetry of power is equally reflected in the legislative and judicial structures available to Palestinians on the one hand, and imposed upon them on the other. The ability of the Palestinian Authority to develop its administrative and judicial institutions has been greatly affected by the prolonged occupation as well as by long-running internal struggles between different political factions with competing claims to being the legitimate representatives of the Palestinian people. The law in the occupied territories is a compilation of the accumulated laws of previous governing orders from the Ottoman empire to the British Mandate, and overlaid upon that are many legal stipulations of the present occupier. A series of laws enacted since 2001 has enabled the creation of a new Palestinian Basic Law and provided for the establishment magistrates courts, courts of first instance and appeal, a Court of Cassation and a High Court of Justice. However, while an up-to-date overview of the functioning of the court system in Palestine is hard to find, a survey of readily available information in English indicates that far fewer first-instance courts than necessary have been built and that the whole system is handicapped by legal obscurity and lack of harmonization, shortages of personnel, inadequate training, unsatisfactory wages and under resourcing.  

Palestinian courts have no civil jurisdiction over actions of the Israeli State or its organs, nor over actions to which Israelis are a party, except in very exceptional circumstances where ‘the [Palestinian] Authority has an overwhelming interest in the case or the Israeli in question can clearly be taken to have subjected himself to Palestinian jurisdiction.’  

Israel's ministry of foreign affairs provides the following summary of the arrangements agreed under Annex III of the Gaza Jericho (or “Cairo”) Agreement of 1994:

The jurisdiction of the Palestinian legal authority extends to all matters falling within its territorial, functional and personal jurisdiction as described in the agreement. This jurisdiction does not extend to Israeli citizens, Israeli settlements or to areas of responsibility not transferred to the Palestinians, such as foreign relations.  

[...]  
The jurisdiction of the Palestinian Authority covers all criminal offenses committed in the area as under its territorial jurisdiction.  

Israel has sole criminal jurisdiction over offenses committed in the settlements and the Military Installation Area, and over offenses committed throughout the Gaza-Jericho area by Israelis. [Emphasis added.]  

Meanwhile, a parallel legal system exists in the occupied territories, in the form of the Israeli military court system. It was created in 1967 and has been in continuous operation ever since. It is part of the Israeli military administration established to govern the Palestinian residents of the West Bank and Gaza  and has been described as “an institutional centerpiece of the Israeli State’s apparatus of rule over the West Bank and Gaza.”

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4 2006 Euromed Justice report.  
5 Eugene Cotran; Chibli Mallat; David Stott (eds); The Arab-Israeli Accords: Legal Perspectives, Kluwer, 1996 p.167.  
7 The occupation of Gaza officially ended in 2005 however opinions differ as to Israel’s ongoing responsibilities there given the degree of effective control it exercises over Gaza’s borders, trade, essential resources, tax revenue etc  
8 Lisa Hajjar ; Courting Conflict: The Israeli Military Court System in the West Bank and Gaza, Univ. of California Press, 2005 p.2
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The military occupation was originally a response to a military offensive against Israel – the ‘six-day’ war of 1967. However in maintaining it for almost fifty years Israel has been able to exploit the undetermined legal status of the Palestinian territories and their population. It has also been able to rely upon its own determination of the existing threat against it – a prerogative of every sovereign State - that is posed by Palestinian ‘terrorist’ acts and organizations. Repeated outbreaks of violence amounting to war, in a scenario also featuring regular instances of lower-level hostilities, have made it possible for Israel to determine the existence a more or less permanent state of conflict or threat. The term ‘war on terror’ coined by former US President George W. Bush has lent credibility to this position. By virtue of its security prerogative, and the infrastructure of the occupation, Israel has been able to consolidate the powers it acquired under the (temporary) zoning arrangements originally agreed in the Oslo Accords.

Israel has used legislation efficiently and effectively to accrue to itself extensive powers of arrest, detention, prosecution and imprisonment of Palestinians according to its own assessment of its security prerogatives. On the administrative side Israel has used legislation to allocate itself wide-ranging powers to define permitted and forbidden activities of Palestinians in large areas of the occupied territories. It does so according to security and other - less explicitly identified - prerogatives that could roughly be gathered under the name of demographic engineering. These include powers to demolish buildings, including residential dwellings, to grant or deny permission for construction of buildings, and unilaterally to move and approve municipal boundaries.

Legal Avenues for Palestinian civilians

Where then, should Palestinians who believe their rights to have been violated, request a criminal investigation or seek redress for damaged or lost properties or the violations of other rights? The combined effect of the restrictions upon the jurisdiction of Palestinian courts on the one hand, and the far-reaching powers of Israel’s military courts and administration on the other, has been to leave Palestinian’s with nowhere to turn but to those very military courts, or to Israel’s civil courts on the other side of the green line – and the wall.

Serious concern has been expressed by internal and international observers about the role of the Military Police Criminal Investigations Division and the Military Attorney General (MAG) in deciding whether or not to open criminal investigations following alleged violations of the human rights of Palestinians by Israeli soldiers. The MAG is an appointee of the ministry of defense on the recommendation of the Israeli Defense Force (IDF)’s chief of Staff. He is himself a high-ranking military officer and chief legal advisor to the (IDF). The obvious potential conflict of interests together with a persistent pattern of failure to open investigations into cases involving violence or death to Palestinian civilians has been documented and strongly criticized. At the same time, Israel has steadily amended its law regulating its own civil liability to Palestinians claiming reparations before Israeli courts. All possible pathways to reparatory justice for Palestinians within Israel are thus extremely narrow. Many of those who nevertheless gather the means and the determination to take these paths, are ultimately thwarted by a network of administrative, legal and physical barriers preventing their entry into Israel to meet their lawyer, obtain medical reports or deliver the required documents to the relevant court within the time limit imposed.

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11 See: Al Mezan repprt “No Reparations in Israel for Palestinians: How Israel’s Amendment No.8 Leaves No Room for Recourse”, July 2015, No. 7 in this reader.
On 2 January 2015 the government of Palestine acceded to the International Criminal Court (ICC). Accession to the ICC depended upon the Palestinian government first winning recognition as ‘a State’ since only States can be parties to the Court. On 29 November 2012 the General Assembly voted in favor of granting Palestine non-member Observer State status among the United Nations. The ICC considered this change of status sufficient to enable Palestine’s accession. On 16 January 2015, the Prosecutor announced the opening of a preliminary examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation are met.

It is against this background that LAW and the Nuhanovic Foundation are collaborating to follow and contribute to the development of legal options for Palestinians both within and outside Israel. The resources gathered in this reader focus on the specific problem of the lack of legal remedies available to Palestinian victims of human rights or humanitarian law violations. It is the goal of the round table meeting to explore all possible legal strategies that may enable Palestinians living under the Israeli occupation to obtain recognition and redress. Options to be explored the possible outcomes of a full investigation by the ICC, bringing cases against the State of Israel before the courts of third States (relying on universal jurisdiction) and the possible prosecution of corporations involved in supplying goods or services to the Israeli military or security apparatus.
The geographical area in which the ongoing struggles for Palestinian autonomy, Israeli security and control, and the peace for which both peoples long, amounts to no more than c. 27,000 km² (slightly larger than Sicily). The Palestinian Authority nominally governs c. 6,000 km², home to roughly 4 million Palestinians, while Israel officially governs c. 21,000 km² and c 8 million Israeli citizens. This map shows the Areas A, B and C designated under the Oslo II accord.
Map showing the progress of the separation wall and its relation to the green line, taken from: http://www.shaularieli.com/77951/About%2DShaul%2DArieli
EXCEPTIONS

PROSECUTION OF IDF SOLDIERS DURING AND AFTER THE SECOND INTIFADA, 2000-2007

September 2008
The report “Exceptions” reveals for the first time full data on how the Israeli military law enforcement agencies (the Military Police Criminal Investigation Division (MPCID), the Military Prosecution and the Courts-Martial) process cases in which IDF soldiers commit offenses against Palestinians and their property. The report offers the first opportunity to examine the quality of the military criminal system’s operations in relation to offenses by soldiers against Palestinian civilians, and it includes the details of each case heard by the Courts-Martial on offenses committed from the outbreak of the second Intifada on September 29, 2000 through the end of 2007.

When criminal offenses committed by IDF soldiers against Palestinians are exposed to the public and draw a public response, the IDF leadership and heads of the Israeli political system are quick to label such actions as “exceptional incidents,” and to promise to hold the perpetrators fully accountable. Israel’s official spokespeople go to great lengths to persuade the Israeli public and international community that such incidents are rare and that they are treated aggressively. But this report shows that the “exceptions” are actually those cases in which soldiers and officers who commit crimes against Palestinian civilians are investigated and prosecuted. Even more exceptional are the cases in which heavy sentences are imposed on the perpetrators for their crimes.

The figures presented in the report were derived, among other sources, from the indictments and judgments of the Courts-Martial during the seven years of the second Intifada. These materials were provided to Yesh Din by the IDF at the end of a prolonged process lasting a year and a half. A review of these documents allows us for the first time to present the magnitude of the IDF’s failure to fulfill its duty to protect the population of the Occupied Territories (OT) from the crimes of its soldiers, a duty set forth in the provisions of international law regarding the management of occupied territories.

The first part of the report focuses on the criminal investigations conducted by the MPCID into offenses by IDF soldiers and officers against civilians in the OT. The report reveals that only in rare cases do Palestinian civilians file complaints directly to the MPCID, due greatly to the fact that the MPCID has no investigation base in the OT. In even fewer cases do commanders fulfill their duty to inform the MPCID of a suspicion that their soldiers have committed criminal offenses against Palestinians. The figures show that only in 60% of the complaints and notices that ultimately reached the MPCID in the last two years (usually through human rights organizations, the Military Prosecution or directly from the plaintiffs) were criminal investigations opened.
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Immediately after the media broadcast a short video clip of a soldier shooting a rubber bullet at extremely close range at a bound detainee, Defense Minister Ehud Barak announced: “The incident revealed yesterday afternoon [...] is an exceptional and unacceptable incident that does not represent the IDF and its values. The IDF will investigate the incident and bring those responsible to justice.” The defense minister’s announcement followed a regular pattern of official reactions to the disclosure of incidents in which IDF soldiers commit criminal offenses against Palestinian civilians and their property: treatment of the incident as an exception along with assurances that the criminals will be held accountable.

In testimony by the Commander of the Paratroopers Brigade, Colonel Yossi Bechar, in the trial of one of his soldiers charged with abusing a bound detainee, the officer remarked:

These incidents are not so rare in number, but there is simply a silence surrounding some of them, and some of them are done in a more sophisticated and criminal way... these cases of Palestinian detainees being beaten by soldiers and police are incidents that unfortunately occur from time to time. In many cases no complaint is made, and there are various conspiracies of silence surrounding them, so that sometimes we only know about them years later, and furthermore, through anonymous messages by [the organization] Breaking the Silence and others, through the media or through other means.

An internal investigation by the IDF also found that about one quarter of IDF soldiers who served at checkpoints had personally engaged in the abuse of Palestinians, taken bribes or committed acts of humiliation and other forbidden acts, witnessed them or heard about them from their colleagues. Following the results of the investigation, an anonymous “senior officer” was quoted by Yediot Achronoth as saying “we knew there was a problem, but we did not expect it to be so serious.”

The laws of occupation (also called the laws of belligerent occupation), a branch of international humanitarian law, require IDF forces to respect the lives, dignity and property
of the residents of the OT. That duty is expressed both by the “negative” duty, according to which it is incumbent upon the IDF and its soldiers to avoid harming the lives, dignity and property of the residents of the OT, and the “positive” duty requiring the IDF to take substantial measures to protect the population of the OT. The fulfillment of that positive duty plays a key role in enforcing the law upon IDF soldiers who commit criminal offenses against the population of the OT.

However, it previously was not possible to assess the extent to which the IDF fulfilled that duty. Full and accurate data about the scope of MPCID investigations into criminal offenses by IDF soldiers against Palestinians and their property was simply not published, nor was full information about their results. Since the vast majority of judgments in those offenses were not made public (nor were they uploaded to the various legal data bases), it was impossible to ascertain to what extent the IDF “held those responsible accountable” as it promised to do in the periodic statements by the heads of the defense system. The purpose of this report is to present those figures to the readers.

From the beginning of the second Intifada on September 29, 2000, until the end of 2007, 135 soldiers and officers were accused of offenses against civilians in the OT, by and large against Palestinians. In a process that lasted nearly a year and a half, from March 2007 (when Yesh Din first submitted its request for copies of judgments and indictments to the IDF Spokesperson) until August 2008, the IDF located the indictments served and judgments given to Yesh Din with copies, after they had been checked and access to them approved by the IDF information security department.

In conjunction with the publication of this report, the Yesh Din website provides the full court judgments in the aforementioned cases, as provided to the organization by the IDF Spokesperson.

This report, which deals with the response of the military law enforcement system to offenses committed by IDF soldiers, does not refer to offenses by members of other security forces who operate in the OT—mainly the Israel Police and Border Police Units. Yesh Din will address their activities in a separate report.

The first part of this report discusses the small number of indictments served against soldiers for offenses committed against Palestinians. This section briefly discusses the manner in which MPCID investigations are opened into offenses by IDF soldiers against Palestinians and their property. Additionally, it presents figures on the number of investigations and defendants charged as a result of those investigations, as well as details about the sentencing of IDF soldiers according to the charges under which they were convicted. The first section of the report also provides data about the realization by Palestinian victims of such offenses of the right to file complaints based on the offenses committed against them and to receive compensation for the harm done to them.

The second part of the report details the results of the prosecution of all soldiers charged with committing criminal offenses against Palestinians and their property during the second Intifada until the end of 2007. The figures are divided into firearm offenses (including shooting that led to the death and injury of Palestinians as well as shooting that did not cause bodily harm), offenses of abuse and violence, property and looting offenses, and other offenses.

Although the first part of the report addresses, among other things, the failures in MPCID investigations and the obstacles facing MPCID investigators, the report does not attempt to present a full picture of the reasons that the vast majority of investigations conducted into offenses by soldiers against Palestinians and their property are closed. A separate report by Yesh Din will be devoted to that subject.

The term “exceptions” has become synonymous in Israeli discourse to grave offenses committed by members of the security forces against Palestinians. This report shows other defendants, all charged as part of one incident of abusing Palestinian detainees, were served before April 15, 2008 (Case/104/03) but the offense of which they were charged was committed in 2008, and therefore their case is not included in this report, as it deals with offenses committed by the end of 2007.
that it would be more accurate to describe as “exceptions” the cases in which soldiers who commit such offenses are investigated, charged and held accountable for their actions. The processing of the officer and the soldier charged in the shooting of the bound detainee, an event mentioned at the beginning of this introduction, is no different: despite the ceremonious promise by the defense minister to hold them accountable, the two were charged with the minor offense of “inappropriate behavior.”

8. As of this report’s publication, the High Court of Justice is still reviewing a petition (HCJ 7160/08) filed by the shooting victim and four human rights organizations, including Yesh Din, against the Military Advocate General for refraining from indicting the officer and the soldier for more serious offenses.
Pte. Partosh, who served as a checkpoint inspector in the Central Command Military Police Unit, was convicted, on the basis of her confession to an amended indictment, of having received 15 packs of cigarettes on various occasions in January 2004 from a Palestinian civilian resident of Tulkarm who passed through the checkpoint. She gave the cigarettes to her colleagues.

Based on the agreement between the parties, the Court-Martial accepted the plea bargain, convicted Pte. Partosh of disgraceful behavior and sentenced her to a fine of NIS 750 and a four-month suspended prison term (Center/613/04. Verdict and sentence: January 3, 2005).

St.-Sgt. Yozefovski, a combatant in the Nachshon Battalion who was the checkpoint commander, admitted that on two different occasions he received food and drink from people going through the checkpoint; that on one occasion he received from a Palestinian peddler, a citizen of Israel, an amplifier that turned out to be broken, and that on another occasion he gave his car to a Palestinian citizen of Israel for him to fix for free.

St.-Sgt. Yozefovski was convicted of inappropriate behavior based on his confession as part of a plea bargain. The Court-Martial adopted the sentence proposed in agreement by the parties and sentenced St.-Sgt. Yozefovski to a NIS 1,000 fine, five months' suspended prison sentence, and a demotion to the rank of Private (Center/614/04. Verdict and sentence: January 3, 2005).

April 24, 2006: the killing of a Palestinian woman and injury of another six people in a traffic accident

Central District Court-Martial Case 185/07

An IDF soldier (about whom Yesh Din has no information) was charged with negligent manslaughter and other offenses, based on his responsibility for a traffic accident during which the vehicle he was driving crashed into a Palestinian taxi, killing a passenger and injuring another six of the taxi’s passengers.

An indictment against the soldier was filed on April 15, 2007 and his trial is still under way.

CONCLUSIONS AND RECOMMENDATIONS

To this day the public has not been granted a credible “snapshot” of law enforcement on IDF soldiers and officers suspected and charged with serious offenses against Palestinian civilians in the Occupied Territories. The report “Exceptions” for the first time publishes full data about how the military law enforcement agencies - including the investigation, prosecution and adjudication bodies - process these cases. The information presented in this report complements the full judgments that can now be viewed - also for the first time - on the Yesh Din website.

The figures presented in the first part of the report show that only some of the complaints brought to the attention of the IDF led to the opening of criminal investigations. Far fewer of those investigations led to indictments; those who were charged were for the most part convicted, but their sentences were usually light, and in many cases the lenient sentencing was a result of plea bargains agreed upon by the prosecution and the defense.

Decisions to open criminal investigations against soldiers suspected of offenses involving shooting civilians are made almost exclusively on the basis of operational debriefings, and only after their conclusion. But the operational debriefing, as indicated by its name, is a tool developed to draw operational lessons. Such investigations were not designed to examine issues of personal criminal responsibility, nor are they suitable for such a task. The investigations are carried out by officers with operational training but without knowledge and experience in criminal investigation. Those officers usually come from the command chain of the soldiers involved in the events. A petition assailing the legality of that policy was made to the Israeli Supreme Court as early as 2003, but there has yet to be a ruling made in the case.

Even when the MPCID does open criminal investigations it appears that seeking the truth is not their exclusive purpose. The Chief Military Police Officer said in comments quoted in the report that one of the purposes of the investigation is to prepare the IDF’s defense line in potential civil claims, and consequently, to minimize the “risk” that victims of the alleged crime will successfully claim compensation from the State of Israel.

In October 2007 the Operational Affairs department was established as part of the Military Prosecution and charged with making decisions regarding investigation files on offenses
against residents of the OT. We hope its establishment will lead to the tightening of supervision of investigations and the improved efficiency of law enforcement procedures.

However, at the time of this writing, dozens of investigation files monitored by Yesh Din are waiting at the Operational Affairs department of the Military Prosecution for a decision on whether to close them or file indictments. In some cases Yesh Din queries wait for weeks or even months just for a decision on whether a criminal investigation will be opened (in accordance with the aforementioned policy regarding investigations of shooting offenses). These facts do not bode well for the activity of the new department of the Military Prosecution, and we hope the pace of its work will improve.

An examination of the judgments given by the Military Courts-Martial in cases in which soldiers and officers were charged with crimes against Palestinian civilians shows that the military judicial system treats such crimes as a whole as an internal Israeli military matter. Many of these cases are discussed in reference to the impact of the defendants’ actions on discipline in the army, its image and the image of the State of Israel. With one or two exceptions, judges in the Courts-Martial made no reference to international law and ignored international criminal law and existing judgments in that area based on the Law of Armed Conflict, Law of Belligerent Occupation and International Human Rights Law.

The Law of the Rights of the Victims of a Crime, passed recently in Israel grants victims of serious offenses, whose complaints are investigated by the Israel Police or the Justice Ministry’s Police Investigation Unit, a series of rights regarding involvement in the criminal process. Among other things, victims of crime have the right to receive updates on developments in the investigation and trial, and in certain circumstances are even given the right to express their positions before key decisions are made in a case. Thus, for example, there is an obligation to consult victims of a crime before deciding to close investigation files or sign plea bargains with defendants. However, the law does not apply to victims whose cases are investigated by the MPCID (Palestinians and other victims - Israeli soldiers or civilians - of actions by soldiers and officers). As a result, Palestinian victims of crimes by IDF soldiers have no standing in the proceedings undertaken in the IDF Courts-Martial, and their position regarding proposed plea bargains is not heard.

The criminal enforcement system has an important role in defending civilians in the OT against violence by the powerful – the soldiers and officers given broad powers and authority. The findings of the report and the information presented therein on the results of each of the criminal investigations that led to the submission of an indictment showed that with few exceptions these investigations do not lead to the enforcement of law upon soldiers and officers who abused the powers given to them, and that the civilians of the OT do not in fact receive the protection of the military law enforcement system. The study shows that this system is defective and inefficient, and therefore the IDF and the State of Israel are breaching the duty bestowed upon them by international law to defend the civilian residents of the Occupied Territories.

Recommendations

- MPCID bases should be established in the Occupied Territories, and Palestinian civilians should be allowed to file complaints in them.
- The use of operational investigations as a main tool in deciding whether to open a criminal investigation should be ceased.
- MPCID investigations should be completely separated from the decision-making process regarding Palestinian claims of compensation. MPCID investigators should be informed that their charge is to expose the truth and not to defend the economic interests of the State of Israel.
- The Law of the Rights of the Victims of a Crime should be amended such that it applies to victims and complainants of offenses under investigation by the MPCID.
- Transparency as to the law enforcement proceedings regarding IDF soldiers suspected of criminal offenses against Palestinians should be guaranteed. This aim should be accomplished, among other ways, by regularly publishing full figures about the number of complaints and notices received by MPCID and the Military Prosecution, the number of investigations opened as a result thereof, and the results of the investigations. The judgments rendered by the IDF Courts-Martial following those investigations should also be published.
The Right to Compensation for the Violation of Human Rights
Adv. Yossi Wolfson

Over the years of Israeli occupation in the Territories, Israel has caused damages to Palestinians on a massive scale. In violation of its duties as an occupying power, Israel subjected the Palestinian economy to the interests of its own economy causing Palestinians to depend on Israeli products and jobs on one hand and preventing them from developing an independent and sustainable economy on the other. Israel has plundered resources from Palestinians such as water and land and damaged their subsistence environment. The Israeli military kills, injures and abuses Palestinians and the Israeli Security Agency tortures them to the point of permanent mental damage. Demolition of houses and destruction of agricultural crops, false arrests, violation of freedom of movement, separation of families – all these and others add up to an ever increasing debt Israeli society owes to Palestinians as a public and as individuals.

Fundamental Rights and the Right to Compensation for their Violation
According to the liberal world view, respect for human rights also means providing relief when they are violated. The right to receive compensation for the violation of fundamental rights derives from the rights that were violated. It is, in fact, intrinsic to them. Thus, for example, a person's right over her body means, inter-alia, that it is forbidden to attack or injure her without justification. However, the right over one's body also entails the right to receive compensation in case of an unjustified attack in order to give the injured person the necessary tools to recover physically and mentally, or at least, to provide her with the treatments and accessories needed for achieving a quality of life which most closely resembles that which she would have had if it were not for the injury. A person who has been blinded will never again see a sunset; a person who was unlawfully imprisoned for five years will never regain her youth or the experiences she missed, a person whose family had been torn apart will never relive the family life which is no more. The monetary payment is both acknowledgement of the violated right and its importance and a rough attempt to compensate for the damage. Sometimes, the very acknowledgement of the harm and its severity provides some relief.

Putting human rights at the foundation of the rules of governance stems from the fact that they are valuable for human beings. Freedom of movement and speech, the freedom to demonstrate, personal autonomy, human dignity which is possible in an egalitarian society are just a few examples of rights without which human existence becomes wretched. These rights are not commodities with a fixed market value which are transferred from one hand to another, but they are no less necessary for our quality of life than those assets normally valued in monetary terms. Examining society from an economic perspective which does not take these values into account would lead to
skewed calculations which do not reflect society's real needs. It would result in preferring interests which are normally assessed monetarily over the most fundamental needs of human beings. In fact, most human beings have very little capital – financial or other, and they are, in any case, invulnerable to property damage of this kind. However, rights such as the right to dignity, liberty and taking part in the life and resources of society – these are universal rights. A legal system which compensates financial damages more than harm to human dignity, for example, is a system which has an inherent bias toward the wealthy and large corporations and disfavors the majority of society. An economic analysis of the law would require, for this reason also, meaningful compensation for the violation of human rights. Poor compensation thereof would lead to a situation where it is financially feasible to infringe such rights in order to promote other goals which society considers less important.

Compensation for the violation of human rights is essential not only in order to bring the injured individual to a state which most closely resembles the one in which he would have been if it were not for the infringement, it is also essential to ensure that human rights will not become empty letters. A right whose violation has no consequence will quickly lose any real substance. Therefore, violation of human rights must yield rapid and effective consequences on two levels: the criminal– locating those responsible and bringing them to trial; and the civil - compensating the victim. A society which does not bring to trial those who violate human rights and does not compensate their victims is a society without accountability and one which implicitly permits abuse of the weak.

The Duty to Compensate in Israeli and international law

The principle that unlawful infringement of human rights requires compensation is well established in both Israeli and international law. The right to relief and compensation for victims of human rights violations is enshrined in the International Convention for Civil and Political Rights and in the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The same principle applies during armed conflicts. War leaves in its wake destruction on an enormous scale. It is not legally required to provide compensation for all of this damage. Yet damage that was caused in the course of a violation of the laws of war (or occupation) does require compensation. Thus for example, article 3 of the 1907 Hague Convention stipulates that parties which violate the provisions of the convention must pay compensation and that each party is responsible for the acts of its soldiers. Article 29 of the Fourth Geneva Convention and article 91 of the First Protocol Additional to the Geneva Conventions repeat this principle. ICRC research regarding international humanitarian law yielded that this is a customary standard. Despite commentary trends that compensation is intended for the state rather than the individual victim of a violation, today more and more commentators claim that the principle of compensation relates to the individual victim. This was determined, for example, in the general principles regarding the right to remedy and compensation for victims of grave violations of international human rights law and international
humanitarian law adopted by the UN General Assembly in 2005. It was according to the principle of individual compensation that Israeli citizens received compensation from Iraq for damages they incurred following the firing of Iraqi missiles on Israel during the first Gulf War. The International Commission of Inquiry on Darfur cited the provisions of article 3 of the Hague Convention when establishing that grave violations of international humanitarian law and international human rights law confer a duty on the violating state toward the victim. But why go as far as Darfour? The International Court of Justice has only recently ruled that one of the ramifications of the illegality of the separation wall is that Israel must compensate everyone who has suffered damages as a result of it.

In Israeli domestic law compensation for the violation of human rights is enshrined mainly in the damages ordinance whose provisions were developed and interpreted through the years in case law. However, Israeli law stipulates that no compensation be given under the damages ordinance for damages caused by the Israeli military in an act of war. This provision does not contradict the obligation to compensate itself. The Israeli Supreme Court has ruled that the purpose of this provision is not to deny compensation but rather that it stems from the view that ordinary tort laws are not suitable for the kind and scale of damage that occurs during wars. Compensation for damages of a warlike nature should be determined by other mechanisms.

**Obstructions to Compensation for Human Rights Violations in the Occupied Territories**

Considering the wholesale nature of Israeli violations of the human rights of Palestinians and the extraordinary scale of the damage it has caused Palestinians, it is surprising that Israel has thus far managed to evade paying its dues. A number of factors have contributed to Israel's success in this.

One factor which historically contributed to Israel's success was the objection to receiving compensation from Israel among Palestinians. This objection may be rooted in the perception that harm is part of the price a person pays in a national struggle. Receiving compensation for the damage, when, for example, it is a relative who has been killed, carries with it the emotional baggage of receiving blood money or hush money, as if one sold the enemy all one holds dear while the occupier bought "absolution". In accordance with this sentiment, as long as the conflict goes on, it is distasteful to arrive at partial arrangements with the enemy which relieve him of some of the responsibility. The taboo on receiving compensation from Israel was weakened somewhat during the 1990's when the peace process was taking place. It may be that the atmosphere of reconciliation was a contributing factor: the collective discussion of a just solution for the conflict legitimizied individual discussions to finalize Israeli debt owed to individual Palestinian victims. The deteriorating economic situation in the Territories probably also contributed to the willingness to claim compensation.

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from Israel. Only on one issue did the taboo on receiving compensation remain in full: payment for land confiscation was perceived as legitimizing the confiscation and maybe even as tantamount to selling the land to Israel. However, once Israel evacuated Palestinian lands in the northern West Bank as part of the disengagement plan, the owners sought compensation for the years of occupancy. Once the land had been returned to its owners, receiving compensation could no longer be seen as selling the land and became legitimate.

It was not only the Palestinians who have not insisted on demanding that Israel compensate them for the damages it caused unlawfully. The international community has also absorbed the damages incurred by Israel. Israel often harms projects established in the Territories by foreign countries. The latter do not always demand compensation for the damage (an exception was the compensation Israel paid the UK for damage to a British cemetery in the Gaza Strip). Donor countries also systematically absorb the damages Israel causes Palestinians. Rather than paying for the destruction it wreaks, Israel turns to the world to fix what it had destroyed and to help – at the expense of their taxpayers – ease the humanitarian crisis Israel is causing.

Another factor which diminishes the amount of compensation Palestinians receive from Israel is the absence of an appropriate mechanism for examining Palestinian claims. The major mechanism which exists today is the Israeli courts, which are, by definition, biased in Israel's favor. They form part of the Israeli regime and the judges presiding in them are Israeli citizens who naturally identify with Israeli interests, have often served in the Israeli military and even personally participated in high ranking positions in the Israeli control apparatus in the Territories. It is easier for these judges to empathize with Israeli witnesses who speak their language. They have been brought up to have faith in the military system. They tend to be skeptical about harsh accusations against "their" military's soldiers. It is difficult for judges, on the other hand, to try to put themselves in the place of Palestinian litigants. They do not normally speak Arabic, much less sensitive to the subtleties of the language and culture. All this places Palestinian witnesses appearing before them at a disadvantage from stage one. Despite the liberal ethos of the judicial system, it is not free of the de-humanization of the other, especially when this other is also an "enemy". The Israeli judicial system is intrinsically not an objective mechanism for resolving disputes between Palestinians and Israel.

A great difficulty with which Palestinian plaintiffs must deal is that of presenting evidence of the exact circumstances in which they incurred the damage. In a properly functioning world, most of the evidence is supposed to be gathered by professional investigative bodies in the course of a criminal investigation of the event. The investigating bodies are supposed to document the scene, collect scientific evidence, back up testimonies from eyewitnesses in real time, identify potential suspects and investigate them in a manner that decreases the chance of coordinating testimonies. In claims brought by residents of the Territories, such evidence is often not available
Owing to Israel's cover-up system as far as offences committed by security forces against residents of the Territories are concerned.

The cumbersome nature of the civil procedure also hinders the resolution of all the claims in the Israeli judicial system. In certain areas (such as road accidents and industrial accidents) Israeli law has erected fairly simple mechanisms for compensating the injured parties. This is not the case when it comes to claims by residents of the Territories which are carried out to the full, minutest, extent of the law. The result is lengthy and expensive proceedings which are not feasible when the damage is relatively small or when the chances of succeeding are any less than very good. There are not enough able lawyers to bring all the claims to final resolution. Most plaintiffs are unable to afford the financial guarantees required in order to ensure coverage of the State's expenses if the case is lost. Israeli plaintiffs are not required to deposit such a guarantee, but the courts demand it from Palestinian plaintiffs since they are "foreigners" from whom collecting legal fees, if so ruled, may prove difficult. Palestinian plaintiffs also find it difficult to come up with the money to pay for medical opinions by Israeli experts. Restrictions on freedom of movement also make communications between plaintiffs and their lawyers as well as bringing witnesses before the courts difficult. Under these circumstances, there is a strong incentive to settle even when the sum of money offered is extremely low considering the real damage.

Israeli courts are obviously not the only mechanism available for determining the compensation to which Palestinian victims are entitled. Following an opinion by the International Court of Justice in the Hague regarding the separation wall, the UN established an apparatus for collecting data on the damages that the separation wall is causing to Palestinians. This apparatus could be the beginning of an international body for reviewing claims by Palestinians against Israel.

Domestic courts abroad may undertake the role of reviewing financial claims by Palestinians against Israel or Israeli citizens who are personally responsible in at least some areas of infringement of fundamental human rights. The willingness of foreign courts to take on this role is expected to increase as the apparatus for resolving claims inside Israel grows less accessible. Absurdly, this is exactly where Israel is headed.

**Israeli Initiatives to Deny Compensation for Palestinians**

As noted, the Oslo process encouraged Palestinians to file claims against Israel. Seeing justice done in individual cases was considered part and parcel to the reconciliation process. Israel's view was absurdly the opposite: as far as Israel is concerned, peace means turning over a new leaf and erasing all past debts. Israel did not see these claims as a golden opportunity to heal the wounds of the past. Its response to Palestinian claims was not to increase supervision of the military to prevent events that may give rise to future claims. Israel also did not take steps to improve the investigations conducted by the Military Police Investigative Unit and by the Internal Affairs Department of the Police in an effort to design tools for effective
resolution of disputes. Rather, Israel took steps to fend off the claims by removing them from its courts without their being reviewed on their merits.

In stage one, the State attempted to claim, in the courts, that the actions of the Israeli military in the Territories were generally "acts of war" for which the state enjoys immunity. The courts refused to accept this interpretation: the military's actions to suppress the first intifada were mostly actions to enforce military law which were not substantially different from police actions and which did not rise to the level of "acts of war". This diagnosis was later affirmed (after a delay of many years) by the Supreme Court.

The State's next move was to change the law so that it would extend its immunity. The move toward changing the law, which began in the mid-1990's was delayed thanks to extreme pressure from human rights organizations and legal scholars as well as international pressure. Over those years, several versions of amendments to the law came up. The version that was finally passed extended the definition of "act of war" and added procedural limitations on Palestinians' ability to file claims against Israel. Amongst others, the period of limitation on such claims was reduced from seven years (the ordinary period of limitations in Israel) to just two, and it was determined that claims could not be filed if the plaintiff had not submitted a notice of damage to the Israeli Defense Ministry – in a preset format and within two months from the time the damage was incurred. The purpose of this provision is ostensibly to allow Israel to carry out a thorough investigation of incidents for which it may be sued. In practice, the cover-up policy has only worsened. The only function of the procedural provisions that were introduced was to block Palestinian plaintiffs' access to the courts.

At the very same time the amendment intended to make it difficult for Palestinians to file claims against Israel was passed, the State presented a new, even further reaching amendment. The amendment, which quickly became law, prevented the courts from hearing claims stemming from actions by security forces in "conflict zones" which were so proclaimed by the Defense Minister – whether it was an act of war or not, whether the action was connected to the conflict or not and no matter how vile the action might have been. The Defense Minister retroactively proclaimed vast segments of the Territories as "conflict zones" for extended periods of time since the beginning of the second intifada. Major cities were proclaimed "conflict zones" for several consecutive years. The proclamation system was such that any incident that might give rise to a cause of action (such as an arrest) became a reason to proclaim an

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2 Civil Wrongs (Liability of the State) (Amendment – Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip), 2001
3 Ibid, section 3.
5 Civil Wrongs (Liability of the State) (Amendment No. 5) (Filing of Claims against the State by a Subject of an Enemy State or Resident of a Zone of Conflict) Law, 2002
6 Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 2005
extremely vast area as a conflict zone on the day of the incident and adjacent days. Thus, in a circular way, a potential cause of action became a cause for state immunity.

Another provision included in the amendment gave the state immunity in claims submitted by subjects of enemy states and members of "terrorist organizations." In this case also, how the person was harmed, how vile the deed done to him was, what the connection between what the victim is accused of (if at all) and the harm done to him are all irrelevant. Immunity applies also when the person involved was acting on behalf of an enemy state or "terrorist organization." Here at least, the immunity is limited only to harm done whilst the victim was acting on behalf of the enemy state or the organization, yet still – there is no relevance to the severity of the harm or the connection between it and the person's action. In effect, the amendment places anyone connected to the Palestinian resistance organizations as well as others outside the law. Thus, for example, the compensation law denies paying damages to the estate of an Israeli citizen who was shot to death by the police while spraying Popular Liberation Front graffiti in Haifa. An Israeli citizen who was enlisted to the Fatah might not receive compensation if he suffered a disability as a result of negligent treatment by a government hospital: he would be better off receiving medical care in a private hospital which does not enjoy the same immunity as the state…

While the first amendment has never been constitutionally examined, the second was challenged is several petitions submitted to the High Court by various human rights organizations and Palestinians whose claims were at risk of being deleted in light of the amendment. In one of his final judgments, Supreme Court President Aharon Barak ruled, with the unanimous agreement of an additional eight justices, that the amendment was not constitutional. The possibility of blanket immunity to the state for actions taken in "conflict zones" was cancelled. The provision which awards immunity from claims by enemy subjects and members of "terrorist organizations" was left for future reference and it was suggested that in order to comply with the Basic Laws, the provisions must be narrowly interpreted.

The HCJ ruling did not put an end to the State's ridiculous attempts to evade responsibility for the damages it has unlawfully caused Palestinians in the Territories. The Justice Ministry in Olmert's government sent out a memorandum intended to reinstate (with slight changes) the arrangement which had been abolished by the HCJ and extend the state's immunity still further than the provisions which had been cancelled. Thus, for example, the memorandum includes a suggestion to further extend the definition of an "act of war" in such a way that it includes actions during which soldiers faced no danger whatsoever. It also includes a suggestion to reinstate immunity on the basis of where the incident took place – and extending it to areas inside Israel. Further still, according to the memorandum, Israel would be fully

8 See supranote 5, section 5b.
9 See for example, HCJ 8276/05, Adalah et. al v. Minister of Defense et. al, (12 December 2006)
10 HCJ 8276/05, Adalah et. al v. Minister of Defense et. al, ruling 12 December 2006,
11 Memorandum of the Civil Torts Law (Liability of the State) (Amendment No. 8), 2007
exempt from paying compensation to residents of the Gaza Strip, no matter the issue. And the new invention: transferring claims from the Territories and claims by "enemies" and "members of terrorist organizations" to the courts in Jerusalem and Beer Sheva. This provision is, so it seems, intended to stop the involvement of Arab judges in Haifa and Nazareth in such cases and make it difficult for Arab lawyers from the North to represent their clients. The proposed bill, if accepted, will of course, harm Palestinian victims but its main purpose is to challenge the constitutional authority of the Supreme Court and the independence of the judicial system in general.

**The Limits and Importance of Civil Claims**

The victory in the Supreme Court has left open the narrow and insufficient avenue of filing claims with Israeli courts. This avenue allows for some justice to be done in individual cases. It also facilitates the exposure of the occupation's mechanisms of injustice. Documents and information of a grave nature regarding the military's conduct are often revealed in the course of conducting these claims. Sometimes, the first and only time soldiers and officers of the Israeli military are forced to be truly accountable for their actions is when they are examined as witnesses in the court in the framework of civil claims. Judgments in claims constitutes, even if only retroactively, judicial review of the conduct of the security authorities.

In the end of 2007 a [claim](http://hamoked.org.il/items/6801.pdf) filed by HaMoked ended in a [compromise](http://hamoked.org.il/items/6801.pdf). The Plaintiff, who had been held in disgraceful conditions at the Ofer Camp during the Israeli invasion of Palestinian cities in 2002, received 105,000 NIS in compensation. Thousands of Palestinian civilians were held with the Plaintiff at the time under the same conditions. These myriad of people did not file civil claims – because of the procedural hurdles, the costs and the trivialization of human rights violations. If one were to derive from the sum on which Israel agreed to compromise in this case, then the Palestinians hold a promissory note worth hundreds of millions of shekels over Israel only for the holding conditions of detainees in April 2002. This debt, as well as the one for decades of Israeli rule has not been redeemed. History teaches that such debts do not simply disappear. Hundreds of years after the fact, the descendents of those who have been the victims of historical injustice rise up and demand compensation from the countries that harmed their ancestors.

May 2008

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HUMAN RIGHTS COUNCIL
Twelfth session
Agenda item 7

HUMAN RIGHTS IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES
Report of the United Nations Fact-Finding Mission on the Gaza Conflict*

*Late submission.

GE.09-15866
PART FOUR: ACCOUNTABILITY AND JUDICIAL REMEDIES

XXVI. PROCEEDINGS AND RESPONSES BY ISRAEL TO ALLEGATIONS OF VIOLATIONS BY ITS ARMED FORCES AGAINST PALESTINIANS

1773. Investigations and, if appropriate, prosecutions of those suspected of serious violations are necessary if respect for human rights and humanitarian law is to be ensured and to prevent the development of a climate of impunity. States have a duty under international law to investigate allegations of violations.

1774. As seen in the preceding chapters, the Mission has investigated a large number of allegations of violations and has found that many of them have substance. The Mission was thus obliged to consider the extent to which Israel has complied with its obligations under international law to investigate those alleged violations. The Mission requested information from the Government of Israel on any inquiry it had conducted into the incidents the Mission had investigated, and the conclusions of such inquiries, if any, but did not receive any reply.

1775. Allegations concerning alleged serious violations of human rights law and international humanitarian law emerged almost as soon as the military operations began. Israel claims to have carried out limited investigations into these allegations, some of which are ongoing.

1776. In the aftermath of the military operations, a group of eight Israeli NGOs wrote to the Attorney General, Mr. Meni Mazuz, requesting the establishment of an independent and effective mechanism to investigate allegations of grave violations of the laws of war during the Gaza offensive. They requested that the investigation should also address “the legality of the actual orders and directives given to forces in the field” and held that the Military Advocate General’s office was not in a position to carry out a proper investigation because of his personal involvement and that of his office’s personnel “during stages of decision-making” in the conflict, which would compromise the neutrality and independence of the investigation.\footnote{ACRI letter to the Attorney General of Israel, Mr. Menachem Mazuz, on behalf of nine human rights organizations, dated 20 January 2009, available at: http://www.acri.org.il/pdf/Gaza200109.pdf.}

1777. In replying to the letter, the office of the Attorney General explained that after the conclusion of the military operations “the IDF began to carry out its operational briefings”, which would also examine various events in which civilians were harmed. It did not accept the assertion that the Military Advocate General’s dual position, as legal adviser to the military authorities and as a person tasked with ensuring that military personnel charged with breaking the law are tried, disqualified him from participating in the investigation.\footnote{Reply of Attorney Raz Nizri on behalf of the Attorney General of Israel, dated 24 February 2009, available at: http://www.acri.org.il/pdf/Gaza240209.pdf.}

1778. The NGOs sent another letter\footnote{Second letter to the Attorney General, on behalf of 11 human rights organizations, dated 19 March 2009, available at: http://www.acri.org.il/pdf/gaza190309.pdf.} but this time the Attorney General did not reply.
1779. On 5 February 2009, a group of Israeli scholars and jurists wrote to the Attorney General also requesting the establishment of an independent body to investigate the actions that had taken place during the military operations. The Mission is not aware that they received any reply.

1780. The Mission also saw press statements regarding the opening of investigations into allegations reportedly made by soldiers at the “Rabin” Preparation Program. On 19 March 2009, the Military Advocate General, Brig. Gen. Avichai Mendelblit, instructed the Criminal Investigation Division of the military police to investigate alleged actions by soldiers during the military operations. The decision came in response to a letter sent to him a few weeks earlier by the head of the Rabin program reporting claims made by soldiers about firing at civilians. According to the Israeli armed forces, the investigation found that the soldiers in question had not actually witnessed the alleged events. In a report released by the Government of Israel in July 2009, two of the incidents investigated were briefly discussed. Not having had access to the outcome of these investigations, the Mission is unable to evaluate the report.

1781. On 22 April the Israeli armed forces released publicly the results of five investigations carried out by teams headed by officers of the rank of colonel. The same information was later reproduced in the report issued by the Government of Israel. The Israeli armed forces stated that the members of the team had had no direct involvement in the chain of command during the military operations in Gaza and had acted with independence, enjoying full access to information, persons and evidence. The process was described as involving “a series of operational investigations”.

1782. According to the same source, the five investigations addressed:

(a) Claims regarding incidents where United Nations and international facilities were fired upon and damaged;
(b) Incidents involving shooting at medical facilities, buildings, vehicles and crews;
(c) Claims regarding incidents in which many uninvolved civilians were harmed;
(d) The use of weaponry containing phosphorous;
(e) Damage to infrastructure and destruction of buildings by ground forces.

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1139 “The operation in Gaza…”, paras. 324-329.
1140 Ibid., paras. 318-320.
1141 “Conclusion of investigations…”.
1783. The observations and conclusions of these investigations have been addressed elsewhere in this report. The conclusion, as stated in the Israeli armed forces’ press release, was that “throughout the fighting in Gaza, the IDF operated in accordance with international law”. However, the “investigations revealed a very small number of incidents in which intelligence or operational errors took place during the fighting”.

1784. The Israeli armed forces stated that the investigation was lengthy and that some specific issues were still being checked and additional allegations were being investigated. The “experts’ investigations”, it was emphasized, were not a replacement for the central Israeli armed forces’ operational investigation into the entire operation, which was under way and to be concluded in June 2009.

1785. In its response to a report by Amnesty International, the Israeli armed forces recalled the “number of investigations” it has conducted following the military operations. In addition to those ordered by the Chief of the General Staff, Lt. Gen. Gabi Ashkenazi, the Israeli armed forces stated it was looking at complaints from various sources, and that “in certain cases, the Chief Military Advocate has already ordered the opening of a criminal investigation”.

1786. On 30 July 2009 there were media reports that the Military Advocate General had ordered the military police to launch criminal investigations into 14 cases out of nearly 100 complaints against soldiers about criminal conduct during the military operations. An official comprehensive report publicly released on the same day spoke of 13 cases, but no details of the cases were offered.

1787. The Mission is not aware of any other investigation or of any other action taken either by the Military Advocate General or the Attorney General in connection with the military operations.

1788. Regarding violence against Palestinians outside the Gaza Strip but in relation to the military operations of December 2008 – January 2009, the Mission has been unable to gather information about any investigations that may be taking place.

A. Israel’s system of investigation and prosecution

1789. The Mission considers that in assessing Israel’s fulfilment of its duty to investigate regard should be had to its internal legal and judicial systems. In cases of suspected wrongdoing the Israeli armed forces may, by law, carry out investigations through: (a) disciplinary proceedings; (b) operational debriefings (also known as "operational investigations"); (c) special

1142 Israel/Gaza: Operation "Cast Lead": 22 days....


investigations, by a senior officer at the request of the chief of staff; and (d) military police investigations, by the Criminal Investigation Division of the military police.\footnote{Law on Military Justice 1954/1955. See also Human Rights Watch, Promoting Impunity: The Israeli Military’s Failure to Investigate Wrongdoing (June 2005), pp. 39 ff.}

1. Disciplinary proceedings

1790. Disciplinary proceedings are usually instituted for minor infractions of military discipline and rules, and do not apply to investigations into serious violations of human rights or humanitarian law. They are not relevant to the alleged violations with which the Mission is concerned.

1791. Several actors play a role in this system of investigation and prosecution: the army, the military police, the Military Advocate General and the courts martial.

1792. The Israeli armed forces officially describe the mission of the Military Advocate General’s corps as follows:

The Military Advocate General’s Corps’ supervises and enforces the rule of law throughout the IDF and provides legal advice to the Chief of Staff and all divisions of the IDF in areas relating to military, domestic and international law. Its mission is to instil the general principles of law and the values of justice in the IDF.\footnote{http://dover.idf.il/IDF/English/units/other/advocate/Mission/default.htm.}

1793. The Mission notes that the Military Advocate General is a military officer, who provides legal advice to the military and at the same time investigates and prosecutes these same military. It also notes that the Government of Israel insists that, despite being part of the military corps, the Military Advocate General acts with full functional independence.

2. Operational debriefings

1794. Article 539 (A) (a) of the Law on Military Justice defines an operational debriefing as: “a procedure held by the army, according to the army orders and regulations, with respect to an incident that has taken place during a training or a military operation or with connection to them”.

1795. The debriefings are reviews of incidents and operations conducted by soldiers from the same unit or line of command together with a superior officer. They are meant to serve operational purposes. Following every military operation “of any kind, a field investigation is conducted in order to examine the performance of the forces and to learn what aspects should be preserved and what aspects should be improved”.\footnote{“The operation in Gaza...”, para. 291.} They are supposed to be confidential so that soldiers speak openly. The findings are forwarded to the Military Advocate General’s office, which may or may not find that there are grounds to suspect that a crime has been committed and order a full criminal investigation. However, if a criminal investigation is opened and the case
goes to trial the debriefing cannot be used as evidence in subsequent proceedings (article 539 (A) of the Military Justice Act).

1796. The use of military debriefings as a regular tool to address incidents emerging from military operations became the rule after an official change of policy was introduced in 2000. The new policy was consistent with a shift to armed conflict paradigm in addressing the intifada. This change of policy meant that criminal investigations were not necessarily the first step even in the face of credible allegations of serious offences committed by military personnel.

1797. The office of the Military Advocate General can consult the operational debriefing and if it considers that a criminal investigation is warranted on the basis of the testimony of soldiers during the debriefing, it can issue orders to that effect. A criminal investigation must start de novo.

3. Special investigations

1798. The Minister of Defense and the Chief of the General Staff may also appoint an officer or group of officers – often high-ranking officers – to investigate high-profile or sensitive matters. The material gathered in special investigations also remains confidential and may not be used as evidence in court proceedings. However, the special investigator makes findings and formulates recommendations. Criminal investigations can be initiated only after the special investigator’s work is complete.

4. Criminal investigations

1799. The Military Advocate General may order the Criminal Investigation Division to open a criminal investigation if he finds that there is “reasonable suspicion” that an offence may have been committed by military personnel.

1800. A summary of the operational debriefings is normally sent to the Military Advocate General’s office, but he may ask to view the full notes. To order the opening of a criminal investigation, the Military Advocate General normally consults with a major general (article 539 (A)(b)(4)(b) of the Law on Military Justice). The materials of the operational debriefing will not serve in such a criminal investigation and will remain confidential from the investigative authorities (art. 539 (A)(b)(4)).

1801. A decision by the Military Advocate General to open or not to open a criminal investigation and his decision to indict or not to indict the suspects may be reviewed by the Attorney General. A complainant or an NGO can trigger this process by simply sending a letter

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1148 Mission interview with Col. (ret.) Daniel Reisner in Geneva, on 6 July 2009. See also an interview with him when he was Assistant Military Advocate General for international law and head of the Israeli armed forces’ International Law Department, in Promoting Impunity..., p. 41; see also B’Tselem, “Military police investigations during the al-Aqsa intifada”, available at: http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp
directly to the Attorney General. The Supreme Court may be petitioned to review the Military Advocate General’s or the Attorney General’s decisions.1149

1802. The investigation by the Criminal Investigation Division should produce a file, which is sent to the Military Advocate General’s office for completion. The Military Advocate General may decide to close the file for lack of evidence, return it for further investigation or issue an indictment. If an indictment is issued, the case proceeds to a court martial before the district and the special military courts, which are formed by three to five judges, the majority of whom have to be officers. Decisions are taken by majority vote and need not be reasoned "unless the Military Justice Law prescribes otherwise" (arts. 392–393).

1803. A decision by a district or special court martial can be appealed to the Military Court of Appeals, whose final decision may need to be confirmed by the Chief of General Staff after consultation with the Military Advocate General. Israel reported that in the past the Chief of General Staff had confirmed all sentences presented to him.1150 Victims or their legal representatives may appeal decisions not to indict to the Military Advocate General and, if unsuccessful, to the High Court of Justice.

B. Legal assessment

1804. Both international humanitarian law and international human rights law establish a clear obligation for States to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not. This rule finds expression in articles 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention and article 146 of the Fourth Geneva Convention; in articles 2 and 6 of ICCPR and article 6 of the Convention against Torture. The Mission considers the obligations on States to investigate and, if appropriate, to prosecute war crimes and other crimes allegedly committed by their armed forces or in their territory as a norm of international customary law.1151

1805. International humanitarian law contains an obligation to investigate grave breaches of the Geneva Conventions. This obligation flows generally from their common article 1, but more specifically from their foregoing provisions. Article 146 (2) of the Fourth Geneva Convention provides that each High Contracting Party shall be under the obligation “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts...”.

1806. There is a parallel obligation to investigate under international human rights law. Article 2 of ICCPR requires a State party to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in it and also to ensure an effective remedy for any person whose rights have been violated. Failure to ensure the rights as required by article 2 would give rise to an independent violation,

1149 “The operation in Gaza…”, para. 300.
1150 Ibid.
… as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

[...]

A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant...  

1807. In several decisions on individual communications concerning offences against the right to life and physical integrity, the Human Rights Committee has held that the failure to investigate and punish the perpetrators constitutes a violation of the Covenant. For instance, in Bautista de Arellana v. Colombia, the Committee held:

… that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.  

1808. This obligation to investigate under human rights law applies equally to actions that take place during armed conflict. In Isayeva v. Russia, a case concerning a woman whose relatives were killed by indiscriminate shelling in Chechnya by Russian forces, the European Court of Human Rights held that the requirements of article 2 of the European Convention applied. This provision, read with article 1 (“to secure to everyone... the rights and freedoms defined in [the] Convention”) would require “by implication that there should be some form of effective judicial investigation when individuals have been killed as a result of the use of force”.

1809. The Court laid down a series of principles which such an investigation should observe: inter alia, that authorities must act on their own motion, act with independence, be effective and prompt.

1810. The Inter-American Court of Human Rights has established similar jurisprudence.

1811. The Mission holds the view that the duty to investigate allegations of serious violations of the right to life and physical integrity under ICCPR extends equally to allegations about acts committed in the context of armed conflict.

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1152 Human Rights Committee, general comment 31 (2004), paras. 8 and 15.


1154 Case Isayeva v. Russia, application no. 57950/00, Judgement of 24 February 2005, para. 209.

1155 See Case of the Ituango Massacres v. Colombia, Case of the Mapiripán Massacre v. Colombia,
1812. The State’s duty to investigate is also firmly established in the jurisprudence of the Supreme Court of Israel. Thus, in the Targeted killings case, which addresses the use of armed force in a context regarded as armed conflict, it held:

… after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent.\textsuperscript{1156}

1813. The Mission notes that Israel does not question its duty to investigate allegations of serious offences by its armed forces. On the contrary, it has repeatedly stated that the investigation system that it has put in place is effective.\textsuperscript{1157}

1814. It remains to be considered whether, in carrying out its duty to investigate allegations of serious violations, Israel has observed the universal principles of independence, effectiveness, promptness and impartially. These principles have been developed in the jurisprudence of international courts of human rights and are agreed upon by the States represented within the relevant United Nations bodies.\textsuperscript{1158}

1815. The Mission finds that the system put in place by Israel, and described above, to deal with allegations of serious wrongdoing by armed forces personnel does not comply with all those principles.

1816. The system is not effective in addressing the violations and uncovering the truth. In this respect the Mission recalls the statements of Col. (res.) Ilan Katz, until March 2003 the Deputy Military Advocate General, criticizing the use of operational debriefings by commanders in order to prevent criminal investigations. In a meeting of the Israel Bar Association’s Military and Security Committee, Col. (res.) Katz was reported to have stated:

From the beginning of the uprising and as of August 2004, about 90 [Military Police Criminal Investigation Division] investigations were opened into the injuries and deaths of Palestinians. About 70 investigations were opened in the last year alone. That shows that they saw that the Operational Debriefing did not lead to uncovering the truth and then the [Military Advocate General] gave an order to begin [Military Police Criminal Investigation Division] investigations. I used to be part of the policy that allowed the Army to use the military debriefing, but the Army did not use the Operational Debriefing appropriately because of a failure to comply with regulations and orders. That tool did not prove itself.

\textsuperscript{1156} Public Committee against Torture in Israel et al. v. Government of Israel et al., case No. 769/02, 13 December 2006, para. 40.

\textsuperscript{1157} “The operation in Gaza…”, paras. 283 ff.

\textsuperscript{1158} Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65, annex), and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 55/89, annex).
1817. Col. (res.) Katz appears to admit that the system does not comply with the requirement of promptness. Even if a decision is made by the Military Advocate General to order the opening of criminal investigations, investigation is usually nearly impossible at that point:

The reason is that when the commanders conduct an operational debriefing they destroy the scene of the crime, and months later it is difficult to find traces of evidence on the ground. You cannot even check the gun from which the shots were fired because by the time the [Military Police Criminal Investigation Division] investigation begins many more shots have been fired by the same gun, or in some cases the gun changes hands and it is very hard to trace it. The debriefing law has a certain logic because it raises the level of credibility of the operational debriefings, but the way it is exploited by commanders in order to prevent [Military Police Criminal Investigation Division] investigations is not reasonable.  

1818. The Mission notes that the report in which the above statements appear has not been contradicted by the Government of Israel. The statements are also consistent with other assessments. Human Rights Watch studied the cases that were investigated between 2000 and 2004, and concluded that very few had actually gone to full criminal investigations and that even fewer had ended in indictments. When convictions did follow, the penalties were noticeably more lenient than those imposed on Palestinian offenders. The organization Yesh Din came to similar conclusions in its study of cases from 2000 to the end of 2007.  

1819. Operational debriefing, to review operational performance, is not an appropriate tool to conduct investigations of allegations of serious violations of human rights and humanitarian law. It appears to the Mission that established methods of criminal investigations such as visits to the crime scene, interviews with witnesses and victims, and assessment by reference to established legal standards have not been adopted. The operational debriefings as well as the five “expert “ investigations carried out by the Israeli armed forces into events during the December–January military operations in Gaza appear to have relied exclusively on interviews with Israeli officers and soldiers. As such, these investigations did not comply with required legal standards.

1820. The Israeli armed forces stated that it had conducted more than 100 “military investigations” into allegations of wrongdoing during the military operations in Gaza. Some 13 criminal investigations have been opened. On the basis of the facts available to it and on the circumstances, the Mission finds that a delay of six months to start these criminal investigations constitutes undue delay in the face of the serious allegations that have been made by many people and organizations.

1821. Amnesty International has said about the public outcomes of Israeli armed forces’ investigations into events during the military operations:

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The information made public only refers to a handful of cases and lacks crucial details. It mostly repeats claims made by the army and the authorities many times since the early days of Operation “Cast Lead”, but does not provide evidence to back up the allegations. It does not even attempt to explain the overwhelming majority of civilian deaths nor the massive destruction caused to civilian buildings in Gaza.\[1161\]

1822. In this regard, the Mission recalls the recommendations made to Israel by the Committee against Torture to “conduct an independent inquiry to ensure a prompt, independent and full investigation” into the responsibility of the State and non-State actors during the war. This recommendation was issued after Israel released the results of five “special investigations” in April 2009.\[1162\]

1823. On the basis of the information before it and the above considerations the Mission finds that the failure of Israel to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligation to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law.

1824. The obligation on Israel to prevent, investigate and punish violations of human rights applies also to its actions or omissions in the West Bank. Such obligation includes the duty to take appropriate measures or to exercise due diligence to prevent, investigate or redress harm caused by private persons.\[1163\] As stated above, the Mission has not received any information indicating the initiation of criminal or other investigations into violence against Palestinians in the West Bank, including East Jerusalem, related to the military operations in the Gaza Strip. Israel appears to do little to protect Palestinians from settler violence and, if investigations into such violence are opened, they are reported to be prolonged and usually result in no action. Yesh Din reports that over 90 per cent of investigations into settler violence are closed without an indictment being filed.

1825. If settlers are convicted, the sentences are reported to be very light.\[1164\] This practice should be contrasted with the harsh treatment and punishment meted out to Palestinians who harm Israelis. This has been described as a discriminatory policy.\[1165\] Similarly, action against members of security forces who commit acts of violence, including killings, serious injuries and other abuses, against Palestinians is very rare. Information available to the Mission points to a systematic lack of accountability of members of the security forces for such acts.\[1166\]

1826. The Government of Israel also reports that, in October 2007, the Office of the Military Advocate for Operational Affairs was established to investigate cases of operational misconduct

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1161 Israel/Gaza: Operation “Cast Lead”: 22 days..., p. 93.
1162 CAT/C/ISR/CO/4, para. 29.
1163 Human Rights Committee, general comment No. 31 (2004), para. 8.
1166 See chap. XXI.
by Israeli armed forces soldiers against Palestinian civilians. This special military prosecution unit allows the automatic opening of criminal investigations in all cases. As a result, the Government reports, the numbers of criminal investigations launched in 2007 and 2008 in relation to abuse against Palestinians have more than doubled, from 152 in 2006 to 351 in 2007 and 323 in 2008.\(^{1167}\) However, no figures are provided about how many of those investigations resulted in indictments and in convictions, and the offence for which the concerned persons were finally convicted.

1827. The same paper by the Government of Israel states that, in military courts as a whole, from January 2002 to December 2008 inclusive, there have been 1,467 criminal investigations, leading to 140 indictments. As of December 2008, 103 defendants had been convicted and 10 cases were still pending. During the first six months of 2009, 123 criminal investigations were opened, leading to 10 indictments so far.\(^{1168}\) This information is contradicted, in addition to being incomplete.

1828. Yesh Din points out that the limited number of indictments leads, in practice, to even fewer convictions. Most of those convictions are for offences that do not reflect the degree of gravity of the action. For instance, from September 2000 to the end of 2007, only 135 soldiers were indicted, of whom some 113 had been convicted by mid-2008. Only 22 underwent full criminal trials in courts martial and 95 were convicted on the basis of their confessions. But as many as 73 confessed to amended indictments and were therefore convicted of less serious offences than the original charges. This situation has been attributed partially to the system of plea-bargaining officially used in Israel and to the willingness of the Military Prosecutor to agree to lesser offences and penalties having due regard, inter alia, to the difficulties encountered in gathering sufficient evidence to back up the original charge.\(^{1169}\)

1829. Another contributing factor is the unprofessional way in which criminal investigations are carried out, making it virtually impossible to prove the charges beyond reasonable doubt. Courts martial have criticized those investigations on several occasions. Military criminal investigators do not seem interested in interviewing victims or witnesses and the quality of evidence gathered is low.\(^{1170}\)

1830. The change of policy instituted in 2000 determining that full criminal investigations are possible only after “operational debriefings” have been carried out means that in practice criminal investigations do not begin before six months after the events in question. By that time evidence may be corrupted or no longer available.

1831. The Mission holds the view that a tool designed for the review of performance and to learn lessons can hardly be an effective and impartial investigation mechanism that should be instituted after every military operation where allegations of serious violations have been made. It does not comply with internationally recognized principles of independence, impartiality,

\(^{1167}\) “The operation in Gaza…”, paras. 294-295.

\(^{1168}\) Ibid., para. 293.

\(^{1169}\) Exceptions: Prosecution…, pp. 33-35.

\(^{1170}\) Ibid., pp. 27-28.
effectiveness and promptness in investigations. The fact that proper criminal investigations can start only after the “operational debriefing” is over is a major flaw in the Israeli system of investigation.

1832. The Mission concludes that there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult.

1833. In this context, the Mission notes that on 21 January 2009 the Office of the Prosecutor of the International Criminal Court received a declaration in the following terms:

‘Pursuant to the provisions of article 12, paragraph 3, of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purposes of identifying, prosecuting and judging the authors and accomplices of acts committed in the territory of Palestine since 1 July 2002.’

1834. Article 12 of the Rome Statute - Preconditions to the exercise of jurisdiction - reads as follows:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

   (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

1835. The Prosecutor may determine that for the purposes of article 12, paragraph 3, under customary international law, Palestine qualifies as “a State”.

XXVII. PROCEEDINGS BY PALESTINIAN AUTHORITIES

A. Proceedings related to actions in the Gaza Strip

1836. The Gaza authorities are responsible for ensuring that effective measures for accountability for violations of IHRL and IHL committed by armed groups acting in or from the
Gaza Strip are established. The Mission points out that such responsibility would continue to rest on any authority exercising government-like functions in the Gaza Strip.

1837. ICHR reports that actions in the Gaza Strip in respect of accountability are limited to the formation of committees to monitor and report on a number of human rights violations.\(^{1171}\)

1838. However, there is no evidence of any system of public monitoring or accountability for serious IHL and IHRL violations. The Mission has heard credible reports of such violations that are discussed in other parts of this report. In particular, the Mission is concerned about the consistent disregard of IHL with which all armed groups in the Gaza Strip conduct their armed activities directed against Israel.

1839. The Mission notes that:

(a) On 10 July 2008, it was reported by BBC that “Hamas security forces” had arrested two members of al-Aqsa Martyrs’ Brigades who had launched rocket attacks on Israel the day before.\(^{1172}\) According to the same report, al-Aqsa Martyrs’ Brigades said members of Hamas’ security forces had chased and “abducted” two of their members. Reuters, later on 10 July 2008, reported that an additional four members of al-Aqsa Martyrs’ Brigades were arrested by Hamas as they tried to fire rockets into Israel;\(^{1173}\)

(b) On 9 March 2009, Islamic Jihad stated that the Internal Security had arrested 10 of its members and forced them to sign statements prior to their being released pledging that they would cease rocket fire on Israel;\(^{1174}\)

(c) On 13 March 2009, an official of the Gaza authorities was reported as saying that security forces would track and arrest anyone suspected of firing rockets into Israel, stating “the rockets have been fired at the wrong time”;\(^{1175}\)

\(^{1171}\) ICHR, *Fourteenth Annual Report*, pp. 179 ff. In relation to internal violence, Al-Mezan pointed out that “previous commissions of inquiry that were established to investigate these violations failed to make public their findings, which has contributed to the reoccurrence of violations” (“Al-Mezan welcomes decision of Prime Minister in Gaza to approve Commission of Inquiry recommendation to dismiss and bring to justice perpetrators of law and human rights violations”, 1 April 2009). Similarly, PCHR lamented “the failure of the Palestinian authorities to take any action to prosecute the perpetrators or to make available the results of any investigations. This contributes to the proliferation of such crimes” (“PCHR demands investigation into death of a civilian tortured by members of the Intelligence Services in Gaza”, press release, 25 March 2009).


\(^{1175}\) *World Tribune*, “Hamas cracks down on the unauthorized, random firing of rockets at Israel”, 13 March 2009.
(d) On 11 July 2009, the Islamic Jihad released a statement in which asserted that two of its members had been arrested by “interior security officials” as they had been preparing to fire mortars into Israel.\textsuperscript{1176}  

1840. As far as incidents of killing, torture and mistreatment within the Gaza Strip in connection with or in the context of the military operations are concerned,\textsuperscript{1177} the Gaza authorities stated that they had investigated allegations of abuse and found that the incidents were “family revenge cases” or individual acts motivated by revenge. Through its competent agencies, the authorities stated that they “had opened investigations into these events immediately after the war” and submitted charges before the competent courts.\textsuperscript{1178} Notwithstanding this statement and any action that the Gaza authorities may have taken, of which the Mission is unaware, the Mission considers that allegations in this respect have gone largely without investigation.

1841. The Mission has taken into account the media reports referred to above, but remains unconvinced that any genuine and effective initiatives have been taken by the authorities to address the serious issues of violation of IHL in the conduct of armed activities by militant groups in the Gaza Strip. The Mission was also given no evidence of any arrests, investigation or prosecution connected with the serious violations of the peremptory norms of international law that have been alleged in information presented in other parts of this report, be these against Palestinian civilians in Gaza or against Israeli civilians.

1842. The Mission is aware that Hamas continues to view all armed activities directed against Israel as resistance to occupation and practices of the occupation, and, therefore, a legitimate right of the Palestinian people. The Mission fully recognizes the Palestinian people’s right to self-determination, in accordance with the Charter of the United Nations and international human rights conventions. It also acknowledges that United Nations bodies and others have repeatedly pointed out practices of the Israeli occupation that deprive Palestinians of their human rights and fundamental freedoms. Nevertheless, the Mission forcefully reiterates that the peremptory norms of customary international law, both of human rights law and humanitarian law, apply to all actions that may be undertaken in response to, or to oppose, human rights violations.

**B. Proceedings related to actions in the West Bank**

1843. The Palestinian Authority has a duty to respect and ensure respect for human rights and humanitarian law in the areas under its authority and control. The duty to investigate and, if appropriate, prosecute alleged perpetrators of serious crimes is also incumbent upon it. It has a general duty to provide an effective remedy to those who allege that their rights have been infringed.

1844. Article 32 of the Palestinian Basic Law provides:

\\textsuperscript{1176} Haaretz, “Hamas nabs two Islamic Jihad preparing to fire mortars at Israel”, 11 July 2009.
\textsuperscript{1177} See chap. XX.
\textsuperscript{1178} Written reply to list of questions formulated by the Mission, July 2009, on file with the Mission secretariat.
Any violation of any personal freedom, of the sanctity of the private life of human beings, or of any of the rights or liberties that have been guaranteed by the law or by this Basic Law shall be considered a crime. Criminal and civil cases resulting from such violations may not be subject to any statute of limitations. The National Authority shall guarantee a fair remedy to those who suffer from such damage.

1845. In its 2008 report, ICHR addresses the system of accountability in the Occupied Palestinian Territory, including the West Bank and the Gaza Strip. Victims of violations may submit a petition to the Attorney General, who should start investigations according to the law. Compensation can also be requested and obtained from the Palestinian Authority through a civil suit. The 1960 Jordanian Penal Code still applies in the West Bank. There is also provision for the enforceability of judicial rulings and sentences (article 106 of the Basic Law).

1846. The Basic Law grants the Palestinian Legislative Council the power to set up fact-finding committees to inquire into any matter of public concern (art. 58), including human rights and freedoms. ICHR observes that, of the few committees established to address human rights issues, none has found its recommendations or findings translated into criminal prosecutions. With few exceptions, it appears that there has been a degree of tolerance towards human rights violations against political opponents, which has resulted in a lack of accountability for such actions.

1847. The Ministry of Interior has also ignored the High Court’s decisions to release a number of detainees or to reopen some associations closed by the administration. The police put in place an internal disciplinary mechanism under which a total of 430 police were sanctioned during 2008. But the Preventive Security agencies and the General Intelligence agencies have not taken any similar measures.

1848. The Mission requested information from the Palestinian Authority about any investigation it had initiated into allegations of violations by members of Palestinian security forces in areas under its jurisdiction. In its reply to the list of questions formulated by the Mission, the Palestinian Authority did not provide any information in this respect. In the circumstances, the Mission is unable to consider the measures taken by the Palestinian Authority as meaningful for holding to account perpetrators of serious violations of international law and believes that the responsibility for protecting the rights of the people inherent in the authority assumed by the Palestinian Authority must be fulfilled with greater commitment.

XXVIII. UNIVERSAL JURISDICTION

1849. In their search for justice, victims of serious violations of human rights have often looked for accountability mechanisms in other countries when there were none at home or the existing ones did not offer an effective remedy. The principle of universality, which says that international crimes that violate fundamental human values are a concern for the entire

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1180 See chap. XXIII.
international community, underpins the exercise of criminal jurisdiction in many States. The exercise of criminal jurisdiction on the basis of the universality principle concerns especially serious crimes regardless of the place of commission, the nationality of the perpetrator or the nationality of the victim. This form of jurisdiction is concurrent with others based on more traditional principles of territoriality, active and passive nationality, and it is not subsidiary to them.

1850. It is uncontroversial today that States may confer upon their courts the right to exercise universal jurisdiction over international crimes, including war crimes, crimes against humanity and genocide. However, there is lingering controversy about the conditions or requirements for the exercise of that jurisdiction and, in particular, about whether the alleged perpetrator should be physically in the territory of the prosecuting State or not.

1851. Universal jurisdiction is also established under certain conventions as an obligation for their States parties. Such is the case of the Fourth Geneva Convention, whose article 146 requires each high contracting party “to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches” and to bring such persons, regardless of their nationality, before its own courts.

1852. Article 5 of the Convention against Torture requires States parties to take measures to establish jurisdiction over the offence of torture and of complicity or participation in torture when the alleged offender is in a territory under its jurisdiction.

1853. Many countries around the world incorporate the principle of universal jurisdiction into their national legislation, including Australia, Bangladesh, Belgium, Costa Rica and Spain.

1854. In connection with past events in the Occupied Palestinian Territory, the Mission is aware of one case pending before the Spanish courts. It concerns the killing of Hamas leader Salah Shehadeh on 22 July 2002 by a one-ton bomb fired from an Israeli F-16 aircraft. The strike also killed a number of other people in the same house and in the house next door. The investigating judge admitted the case for investigation on the basis of the universality principle and after determining that the Israeli internal investigation system did not satisfy the requirements of the right to an effective remedy. This decision was overturned by the Appeals Chamber, whose decision is, in turn, being appealed now to the Supreme Court.\footnote{Auto, 4 May 2009, Juzgado Central de Instrucción No. 4, Audiencia Nacional; Auto No. 1/09, 9 July 2009, Sala de lo Penal Pleno, Audiencia Nacional.}

1855. There are other cases pending before national courts of several European States, such as the Netherlands\footnote{PCHR, “Torture victim seeks prosecution of former head of Israeli general security services”, press release, 6 October 2008, available at http://www.pchrgaza.org/files/PressR/English/2008/92-2008.html. This case is brought under articles 6 and 7 of the Convention against Torture.} and Norway.\footnote{Auto, 4 May 2009, Juzgado Central de Instrucción No. 4, Audiencia Nacional; Auto No. 1/09, 9 July 2009, Sala de lo Penal Pleno, Audiencia Nacional.} In South Africa, a request for prosecution is being considered by the National Prosecuting Authority.\footnote{See Customary International Humanitarian Law..., rule 157, p. 604.}
1856. Criminal investigations and prosecutions by countries other than Israel are possible on the basis of the principle of nationality of the offender. Several countries provide their courts with jurisdiction over their own nationals regardless of the place where the offence has been committed. For instance, article 5 of the Convention against Torture requires States parties to establish jurisdiction over offences defined in it when the offender is a national.

1857. It is the view of the Mission that universal jurisdiction is a potentially efficient tool for enforcing international humanitarian law and international human rights law, preventing impunity and promoting international accountability. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards and establish judicial accountability over its military actions in the Occupied Palestinian Territory, and until such a time as clarity is achieved as to whether the International Criminal Court will exercise jurisdiction over alleged crimes committed in the Occupied Palestinian Territory, including in Gaza, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of grave breach provisions of the Geneva Convention of 1949, prevent impunity and promote international accountability.

XXIX. REPARATION

1858. The extent of the damage and destruction inflicted on Palestinian lives and property, and on Palestinian civilian objects has been substantial. The Palestinian Authority estimated the total cost of early recovery and reconstruction at US$ 1,326 million in March 2009.\textsuperscript{1187} To this amount should be added the indirect costs of the impact on human and animal health, the environment and market opportunities. These losses are still to be estimated.

1859. The international community, bilateral donors and multilateral agencies (including the United Nations specialized agencies, programmes and funds) have been responsive to the urgent needs of the Palestinian people in the Gaza Strip. A number of development NGOs operating in the Gaza Strip have redoubled their efforts. The Gaza Flash Appeal 2009,\textsuperscript{1188} prepared by aid agencies operating in the Gaza Strip, called for US$ 613 million to meet the requirements of urgent life-saving projects and initial crucial repairs to infrastructure over a period of nine months. By the middle of 2009 only a fraction of those requirements had been met. The United Nations Resident/Humanitarian Coordinator in the Occupied Palestinian Territory has said that although donor countries had pledged billions of dollars for Gaza’s reconstruction, it cannot begin because of the ongoing Israeli blockade.\textsuperscript{1189} In addition, some international donors are

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\begin{footnote}{1185} Spiegel Online International, “War crimes in Gaza? Palestinian lawyers take on Israel”, 6 May 2009, available at: \url{http://www.spiegel.de/international/world/0,1518,628773,00.html}. Lawyers in Norway are seeking an arrest warrant against several senior Israeli officials.
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\begin{footnote}{1186} The request, against more than 70 persons, was submitted by civil society organizations under a South African law which gives effect to the Rome Statute and makes the prosecution of war crimes and crimes against humanity a legal obligation.
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\begin{footnote}{1187} \textit{Palestinian National Early Recovery and Reconstruction Plan...}, p. 11.
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\begin{footnote}{1188} Occupied Palestinian Territory: Gaza Flash Appeal, Consolidated Appeal Process, 2009.
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\begin{footnote}{1189} United Nations News Centre, “Unresolved Gaza crisis hampering efforts to advance Mid-East peace – UN envoy”, 23 June 2009.
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reluctant to disburse funds in the current climate of uncertainty created by the rift between the two rival Palestinian political groups in Gaza and the West Bank.\textsuperscript{1190}

1860. Notwithstanding the response by the Palestinian Authority and the international community to the crisis resulting from the combined effect of the blockade and the military operations of December 2008–January 2009, the Mission is more concerned about the individuals (women, men, children and the elderly) and their families, and their ability to rebuild their lives after this traumatic experience. The Mission is conscious that rebuilding Palestinian lives and livelihoods will not be fully possible until the effects of the occupation, the blockade and successive military incursions are eliminated. One should not lose sight, however, of the individual human dimension. That dimension flows from the right to a remedy and reparation that the Palestinian people and individual Palestinians have under international law. Palestinian lives, physical integrity and health have been affected, in many cases very seriously and irreparably. In addition to the loss of life and limb, considerable mental harm has been inflicted on many people who have lost relatives and often financial support. The psychological harm caused to the Palestinians in Gaza is still to be assessed and also requires reparation measures; so, too, the destruction of houses and private property.

A. The right to a remedy and reparation under international law

1861. The obligation to make full reparation for the loss or injury caused is an international obligation incumbent upon a State responsible for an unlawful act. International law also recognizes victims’ rights to an effective remedy and reparations for damage or loss resulting from violations of their human rights. This obligation and these rights are recognized in international treaties and customary international law.

1862. As early as 1927, the Permanent Court of International Justice established the provision of reparation for the injury caused by an international wrongful act as a principle of international law: “Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself”.\textsuperscript{1191}

1863. This principle was codified by the International Law Commission in article 31 of its draft articles on responsibility of States for internationally wrongful acts.\textsuperscript{1192}

1864. The principle that a State responsible for breaching an international obligation should repair the damage or loss caused can also be found in international humanitarian law conventions and human rights treaties. These include article 3 of the 1907 Fourth Hague Convention, article 51 of the First Geneva Convention, article 52 of the Second Geneva Convention, article 131 of the Third Geneva Convention and article 148 of the Fourth Geneva Convention. A similar rule is provided for in article 91 of Additional Protocol I to the Geneva Conventions.


\textsuperscript{1191} Chorzów Factory case, 1927, P.C.I.J. (Ser. A) No. 9, p. 21.

\textsuperscript{1192} General Assembly resolution 56/83, annex; see also Customary International Humanitarian Law..., rule 150, p. 537.
1865. Reparation as part of the right to a remedy has been enshrined in article 2 (3) of ICCPR, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and article 39 of the Convention on the Rights of the Child. The Rome Statute also provides for the right of victims to participation in the proceedings (art. 68 (3)) and to reparations (art. 75).1193

1866. Reparation can take the form of restitution, compensation or satisfaction, but may also include measures of rehabilitation of victims and guarantees of non-repetition.1194

**B. Compensation and reparations to the Palestinian people in the Gaza Strip**

1867. According to news reports, UNDP and the Palestinian Authority signed an agreement allocating US$ 270 million for the restoration of the agricultural sector in Gaza. This will allow for the payment of a compensation package to Palestinian farmers for property damaged during the most recent military operations in Gaza, repair of the damaged infrastructure, damaged orchards, fisheries, livestock, greenhouses, irrigation networks and roads.1195 Cash assistance was also to be provided to some 10,000 non-refugee Palestinians whose houses have been destroyed or damaged.1196 While in Gaza City, the Mission learnt that such compensation schemes were being implemented.

1868. These assistance and compensation schemes notwithstanding, the Mission is of the view that international law requires the State responsible for the internationally wrongful act to provide reparation and compensation to the victim. To the Mission’s knowledge, Israel has to date considered compensation to be paid only to the United Nations for the damage inflicted on United Nations personnel and facilities, without acknowledging responsibility.1197 At the very least, similar compensation should be offered to Palestinian individuals.

1869. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice affirmed that “Israel has the

1193 See also principle 11 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147):

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt reparation for harm suffered;

(c) Access to relevant information concerning violations and reparation mechanisms.

1194 See article 34 of the draft articles on responsibility of States for internationally wrongful acts. Rehabilitation and guarantees of non-repetition are listed as forms of reparation in the above-mentioned Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.


1196 UNDP, “10,000 families in Gaza to receive cash assistance for damaged homes”, news release, 10 February 2009.

obligation to make reparation for the damage caused to all natural and legal persons concerned.”

The United Nations has established the United Nations Registry of Damages, which collects data on damage caused to Palestinians by the construction of the Wall. Domestic law of Israel would be one vehicle to make possible reparations for affected Palestinians.

The United Nations Registry of Damages, which collects data on damage caused to Palestinians by the construction of the Wall.

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The possibilities for obtaining reparation and compensation in the Israeli legal system have been limited. A 2001 amendment to the Civil Wrongs Act extended the definition of “acts of war” and set procedural limitations on Palestinians’ ability to bring claims against Israel. These limitations include the shortening of the period before the statute of limitations applies and the requirement to submit a “notice” of damage to the Israeli Defense Minister in advance of the claim and within two months after the damage occurred. Additional amendments passed in 2002 and 2005 prevent the courts from hearing claims relating to actions by security forces in “conflict zones” proclaimed as such by the Minister of Defense, and give immunity to the State against claims by subjects of enemy States or members of “terrorist organizations”. Under the last two amendments the character of the harmful act, the circumstances under which harm was suffered and the causality link between the perpetrator and the harm have become irrelevant. The Mission received information that the amendments allowed the Minister of Defense to declare areas in the Occupied Palestinian Territory as “conflict zones” retroactively.

The 2005 amendment No. 7 was challenged before the Supreme Court of Israel, which ruled in 2006 that section 5C of the Civil Wrongs Law (as amended in 2005) was not constitutional. Therefore, the provision that makes Israel immune from civil liability for acts of security forces in declared “zones of conflict” was struck down. However, the ruling did not pronounce on the constitutionality of section 5B of the Law, which grants immunity to the State against civil claims brought by subjects of a State enemy of Israel and persons active in or members of a terrorist organization. At the same time, other amendments passed prior to 2005 have not been challenged and stand as law in force in the land.

The Mission is concerned that the possibilities for civil compensation for damage and loss of property suffered by Palestinians during military operations are limited in Israeli domestic law since that damage is generally seen as the result of “acts of war” regardless of the nature of the action. In a recent decision concerning a claim on behalf of a Palestinian killed by helicopter fire on 16 April 2002 during the so-called Operation Defensive Shield, in Nablus, the Court ruled that this was an “act of war” designed to “vanquish the terrorist infrastructure”. The Jerusalem Magistrate's Court held that an air strike is clearly an act of war “that the legislator intended to

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1198 *Legal Consequences …*, para. 152.

1199 Its mandate is limited to the registration of the damage or loss suffered as a result of the construction of the Wall in the Occupied Palestinian Territory.


1201 Civil Wrongs (Liability of the State) (Amendment No. 5) (Filing of Claims against the State by a Subject of an Enemy State or Resident of a Zone of Conflict) Law, 2002, and Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 2005, sections 5B and 5C.

make immune to prosecution” even when the plaintiffs showed that the victim was a civilian standing on the roof of his house. 1203

1873. It is the view of the Mission that the current constitutional structure and legislation in Israel leaves very little room, if any, for Palestinians to seek compensation. The international community needs to provide an additional or alternative mechanism of compensation by Israel for damage or loss incurred by Palestinian civilians during the military operations. In this regard, the Mission notes that the International Commission of Inquiry on Darfur and the Commission of Inquiry on Lebanon expressed similar concerns about the need for compensation for the victims. 1204

1203 Odah et al. v. The State of Israel, case No. C/007798/04, Judgement of June 2009 not yet reported.
PART FIVE: CONCLUSIONS AND RECOMMENDATIONS

XXX. CONCLUSIONS

A. Concluding observations

1874. An objective assessment of the events it investigated and their causes and context is crucial for the success of any effort to achieve justice for victims of violations and peace and security in the region, and as such is in the interest of all concerned and affected by this situation, including the parties to the continuing hostilities. It is in this spirit, and with full appreciation of the complexity of its task, that the Mission received and implemented its mandate.

1875. The international community as well as Israel and, to the extent determined by their authority and means, Palestinian authorities, have the responsibility to protect victims of violations and ensure that they do not continue to suffer the scourge of war or the oppression and humiliations of occupation or indiscriminate rocket attacks. People of Palestine have the right to freely determine their own political and economic system, including the right to resist forcible deprivation of their right to self-determination and the right to live, in peace and freedom, in their own State. The people of Israel have the right to live in peace and security. Both peoples are entitled to justice in accordance with international law.

1876. In carrying out its mandate, the Mission had regard, as its only guides, for general international law, international human rights and humanitarian law, and the obligations they place on States, the obligations they place on non-State actors and, above all, the rights and entitlements they bestow on individuals. This in no way implies equating the position of Israel as the occupying Power with that of the occupied Palestinian population or entities representing it. The differences with regard to the power and capacity to inflict harm or to protect, including by securing justice when violations occur, are obvious and a comparison is neither possible nor necessary. What requires equal attention and effort, however, is the protection of all victims in accordance with international law.

B. The Israeli military operations in Gaza: relevance to and links with Israel’s policies vis-à-vis the Occupied Palestinian Territory

1877. The Mission is of the view that Israel’s military operation in Gaza between 27 December 2008 and 18 January 2009 and its impact cannot be understood or assessed in isolation from developments prior and subsequent to it. The operation fits into a continuum of policies aimed at pursuing Israel’s political objectives with regard to Gaza and the Occupied Palestinian Territory as a whole. Many such policies are based on or result in violations of international human rights and humanitarian law. Military objectives as stated by the Government of Israel do not explain the facts ascertained by the Mission, nor are they congruous with the patterns identified by the Mission during the investigation.

1878. The continuum is evident most immediately with the policy of blockade that preceded the operations and that in the Mission’s view amounts to collective punishment
The Price of Internal Legal Opposition to Human Rights Abuses

MICHAEL SFARD

Abstract

Many of the legal campaigns against governmental practices and policies in large-scale human-rights abusing regimes are waged ‘internally’, through the regime’s own institutions. Such litigations raise serious dilemmas for human rights lawyers and for human rights organizations. This essay is an attempt to dig out the implications of these internal legal struggles, whatever their effectiveness, for the project of bringing an end to the human rights abusing regime. The essay analyzes 35 years of ongoing, occupation-related human rights litigation in the Israeli court as a generic example of a massive ‘internal’ legal opposition. The author of this essay, an Israeli lawyer, involved in such litigations, reaches a painful conclusion: although internal legal action might ease human sufferings in individual cases, it nevertheless potentially empowers the regime and contributes to its sustainability.

Keywords: Humanitarian Law; Israel; legitimization; occupation; sustainability

I was not, as I liked to think, the indulgent pleasure-loving opposite of the cold rigid Colonel. I was the lie that Empire tells itself when times are easy, he was the truth that Empire tells when harsh winds blow (Coetzee, 1980: 135).

The Question

It happened almost imperceptibly. The Israeli Supreme Court (hereinafter: ‘the Court’) has ruled that its power to judicially review any military activity extends beyond the border of the State of Israel; or, to put it differently, that it can examine the deeds of the military and the civilian administration dominating the lands conquered by Israel in the 1967 war. During that war between Israel and its neighbouring Arab countries, Israel occupied the West Bank, which until then was under Jordanian rule, and the Gaza strip, which was under Egyptian domination. The 1967 belligerent conquests submitted millions of Palestinians to an Israeli military regime, stripping them of basic civil and political rights. The occupation, which was supposed to be temporary (and is defined as such in International Humanitarian Law), continues, more than four decades after its establishment.

1 Since Israel does not have agreed and defined political borders, I am referring here to the boundaries of the regions to which Knesset-enacted Israeli law is applicable.
At the time the ruling of the Court was given, 5 years into the Israeli occupation of the Palestinian lands, no one seemed to be aware of the possible ramifications of submitting occupied territories to the jurisdiction of the occupier’s court. In fact, the Court’s acknowledgment of its jurisdiction over the military activity in the Occupied Territories was only implicit. An internal dispute between Palestinian employers and employees resulted in the Military Commander’s decision to change the existing labour laws in the territory – according to international law, the Military Commander is vested with the powers of all branches of government and is responsible for the territories under his domination (only ever ‘his’; never ‘hers’). One party petitioned the decision arguing that the Commander had exceeded his authority. The Court did not raise the question of jurisdiction and gave a ruling on its merits, applying the international law of belligerent occupation.2

Since then, the Court has been regularly reviewing the decisions of the Military Commander of the Occupied Territories. In retrospect, the 1972 decision tacitly paved the way for occupation-related jurisprudence in the Israeli Court. After 1972, the Court’s courtrooms gradually became the major arena for the struggle against human rights abuses by the occupation forces. Much of the energy and resources of the human rights movement have been channelled in this direction.

The legal field created by the Court’s expansion of its territorial jurisdiction became a ground for an intensive, decades-long legal drama. Four actors have appeared on the stage: the Military Commander; the Palestinian civilian who is the subject of the military regime; the human rights lawyer and campaigner who represents the struggle for human rights and civil liberties in those territories; and the Court itself, torn by a complex net of interests, pressures and, naturally, by legal doctrines.

More than 35 years have passed and none of the actors has left the stage nor has the drama ever reached its conclusion. New conflicts between the actors emerge every so often and the legal disputes go on. The scenario is always the same: the military introduces new means of domination and makes claims to new types of power; the Palestinians, often assisted by human rights organizations and lawyers, lodge petitions challenging the legality of those means and powers; the Court’s docket is inundated with occupation-related cases. The show goes on and on.

Looking back at the four decades of this ongoing legal struggle, can we declare a winner? Can we decide whether ‘taking the occupation to court’ is an effective strategy? Above all, for whom is this move beneficial, if for anybody? Do we know for whom the legal struggle is worth fighting?

A thorough analysis of the occupation-related legal practice and jurisprudence leads to two contradicting conclusions. On the one hand, the Israeli Court’s jurisprudence has systematically enhanced the power and authority of the Israeli Army and approved a wide range of abuses of the rights of the occupied population. This was done even when the power sought contravened basic tenets of international law. In fact, the Court has become one of the pillars of the Israeli occupation and its judgments have been used both as forms of authorization waved daily by the army and the government, and as a major public relations tool, applied both internally and internationally.

On the other hand, Court proceedings had a mitigating influence on the activity of the Israeli Defense Forces and its subsidiary bodies: it generated self-restraint among officials, who would not succumb to petitioner’s demands unless a petition was lodged or the judges questioned the army’s position during the hearings; and it strengthened procedural rights (such as the right to be heard, right of appeal, etc.). This striking combination of upholding abusive practices and creating self-restraint raises the question, which of the above-mentioned influences of Court proceedings is to receive more weight? Which of them, if any, has been more influential in shaping the occupation?

While most human rights legal discourses hold law and courtroom litigation to be a tool for combating abuses, experience of some human rights campaigns is quite different and results in violations being negotiated through the law. The danger in such ‘violations under the law’ is obvious and stems from the *legitimizing power* the law has, which is fiercely sought by some abusing regimes. Thus, the human rights practitioner, possessing the primary power of choosing which legal battles to fight, is instrumental not only in igniting processes that might end in ruling out and banning abuses. He or she is also responsible in many cases for launching procedures that ended up in legitimizing, shaping and fine-tuning violations.

In the rest of this article I will try to examine these themes from the *human rights lawyer’s perspective*. I will do so by exploring the lessons to be learned from experience gathered in the four decades of legal fights against Israeli policies and practice in the Palestinian territories that abuse human rights. Through these lessons I will try to appraise the pros and cons of going to court. The obvious answer is that since lawyers are only interested in safeguarding their clients’ rights, and since in occupation-related cases the breach of those rights are a given, the client has nothing to lose in litigating the case.

But this analysis oversimplifies the role of human rights lawyers in combating large-scale human rights abusing regimes. It overlooks the fact that human rights lawyers are no ordinary lawyers. They are, in a way,
independent political actors, sensitive to the potential consequences of one litigation on another and to the human rights situation in general. In other words, even if the particular client has nothing to lose from going to court, the human rights perspective must be sensitive to the litigation’s ramification on the overall fight for securing human rights. In the context of the Israeli occupation, the overall goal of the fight is to end the occupation. As the occupation is, in itself, a violation of democracy, in that it institutionalizes inequality and suspends basic civil rights, the occupation in itself is a human rights issue. Therefore, in examining the Court’s contribution or damage to human rights and human rights lawyers’ shared responsibility, one must examine the Court’s role in strengthening or weakening the occupation as a legal and political entity. In other words, the assessor of the Court’s jurisprudence and of human rights legal activity will have to consider the effect they both have on the sustainability and durability of the occupation.

You Win Some, You Lose Some

Probably, the oldest slogan lawyers use to cheer themselves and their clients up is ‘you win some, you lose some’. Evaluating whether the ‘some’ victories are worth the ‘some’ losses, demands inflating them, both with a measurable value, and defining clearly what constitutes a success and what should be considered a failure.

Losing some

The Court’s record in guaranteeing human rights for the residents of the occupied Palestinian territories is extremely poor, to say the least. As Ketzmer (2002) shows in his thorough study of the Court’s jurisprudence in occupation-related cases, whenever the Court had to interpret international law, to establish the boundaries of authority, or to declare the legality of a policy, the Court’s ruling, almost without exception, has strengthened the powers of the Military Commander, broadened the borders of his authority, legitimized his decisions, and left basic human rights unprotected. In 40 years of occupation, the Israeli human rights legal establishment has never missed an opportunity to challenge abusive practices and policies; these efforts were systematically undermined by the Court, which invariably went a long way to secure the legitimacy of the military actions. It dismissed well-grounded and legally sound petitions even when it meant violating basic tenets of legal interpretation. The Court went so far as to compromise the consistency of its own decisions. The few exceptions to this rule won, by the
sheer force of their rarity, disproportionate public attention. Legal analysts and the Court itself, by translating those extraordinary rulings into English, would deliberately make them more noticeable than any other.⁵

Here are several examples of the Court’s dubious human rights occupation-related record. Article 49 of the Fourth Geneva Convention states, among others: ‘Individual or mass forcible transfers as well as deportations of protected persons . . . are prohibited, regardless of their motive’. According to the Court’s interpretation, this article does not prohibit individual deportations for security reasons.⁶ The Court’s analysis was based on an extremely broad and counter-textual interpretation that used mass deportations conducted by the Nazis during World War II as a generic example of the provision’s prohibition. In a later case, the Court used an opposite, black letter law approach to support the transfer of Palestinian detainees to detention centres in Israel. The Court had to interpret Article 76 of the Fourth Geneva Convention that maintains that ‘Protected Persons accused of offences shall be detained in the Occupied Territory and if convicted they shall serve their sentence therein’. According to the Court, this rule does not apply to those who are subject to administrative detention, and it thus does not protect them.⁷

The Court has approved the establishment of several Israeli-Jewish settlements in the Occupied Territories (Beit-El in the West Bank and Fithat-Rafiah in Sinai Peninsula) under the pretext of ‘military necessity’. It did so in contrast to the clear language of Paragraph 6 of Article 49 of the Geneva Convention that clearly prohibits the transfer of citizens of the occupying power to the occupied territory.⁸ When, for the first time, the

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⁵ As may be remembered, the Israeli Supreme Court has outlawed the usage of torture in security interrogations. The Court is always happy to cite its own decision and it considers this a landmark ruling. But legal history shows that there is very little to be proud of. The first petition against the use of torture, filed in 1991, was dismissed by the court (see H.C.J. 2581/91 Morad Adnan Salabat v. The Government of the State of Israel (1991) 47 (4) P.D. 837). It took the Court almost 6 years to issue its famous opposite decision in another petition (H.C.J. 5100/94 Public Committee against Torture in Israel v. The Government of Israel (1999) 53 (4) P.D. 817) [An English version of the Judgment is available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.HTM]. In the meantime, the Court refused numerous requests for interim measures, and thus thousands of Palestinians were tortured while the case was pending.


⁸ See the Rafiah case, supra, note 10; H.C.J. 606/78 Ayub v. Minister of Defense 33 (2) P.D. 113 [English Summary: (1979) 9 Isr YHBR 337] (Hereinafter: ‘the Beit-El case’).
‘military necessity’ argument failed, the Court declared the formation of a settlement (Elon Moreh) illegal. The Court in the Elon Moreh case refrained from ruling on the legality of the settlements under international law. Instead, the outcome was reached by constraining the power to requisition private land for that purpose. As a result, the settlement movement began using State-owned land and the question of the legality of Jewish settlements was again waiting to be answered by the Court. At this stage, the Court refused to adjudicate, grounding its decision in the claim that the issue is politically charged and thus non-justiciable. The Court’s abstention enabled one of the main sources of Palestinian-rights violations to run wild: the settlement movement. Here, as in other cases, the golem [dummy] has overwhelmed its creator.

Palestinians could not rely on the Court’s protection also in matters of residency and family unification. The Court was ready to declare almost any military policy as legal. It upheld the practice of stripping Palestinian civilians of their residency status whenever a person has lived several years outside the Occupied Territories. Under this policy, a Palestinian who has spent as little as 4 years with his or her nuclear family in a neighbouring country is not allowed to resettle in the Occupied Territories. The Court has also supported the government and the army in refusing numerous family reunification requests, and it did so even when husband–wife or child–parent unification was requested.

During the second Intifada (Palestinian popular uprising) and in recent years, the Court supported the army by authorizing severe violations of human rights. This was done under the excuse of the ‘war against terror’. The Court allowed seizure of private lands for the construction of roads bypassing Palestinian towns and villages, as well as the demolition of houses for military needs. It did not prevent the uprooting of olive groves, or the destruction of a plantation because it was used by a Palestinian sniper; the closing of schools and the use of the school buildings for military needs; the cutting of electricity and fuel supplies to

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13 H.C.J. 2977/02 Adalla v. IDF Commander 56 (3) P.D. 6.
15 H.C.J. 4219/02 Gisin v. The Military Commander 56 (4) P.D. 608.
16 H.C.J. 8286/00 The Association for Civil Rights in Israel v. The Military Commander (unpublished).
and the construction of walls and fences on Palestinian soil, as a security barrier (known as the ‘separation barrier’), separating Palestinians from their cultivated lands and seriously damaging Palestinian civic life in multiple ways. The Court has also allowed (sometimes by way of indecision) the evolution of the Israeli self-proclaimed ‘policy of separation’, which aims to ‘separate’ Palestinians from Israelis in the West Bank. This policy combines several practices including channelling Palestinians and Israelis to different road systems; applying different legal norms to each community and creating separate residential zones for each, physically enforced by walls and fences. And this is only the beginning of the long list.

Winning some

This list is staggering. Considering the Court’s record, why do Palestinians and human rights lawyers keep returning to the bench? The answer lies not with the Court’s jurisprudence in cases challenging the legality of policies, but rather with the influence Court proceedings have on decisions taken by the military administration in individual cases. As Ketzmer shows in his study, and as every human rights lawyer in Israel knows from her or his practice, in many cases the administration scrutinizes its own activity without a judicial determination – in ‘the Court’s shadow’ (Ketzmer, 2002: 189–190). In many cases, petitioners’ success is achieved, in whole or partially, without a court ruling. The change in the administration’s position prior to a judicial decision usually happens at one of the following three stages: during preliminary informal procedures involving the Attorney General’s office; at the time of negotiations conducted while a petition is pending; and after a hearing takes place, as a result of pressure imposed by the Judges through their comments. Indeed, many types of remedies, on a variety of human rights issues, are guaranteed ‘in the shadow of the Court’. These range from permits to enter the ‘seam zone’ or to exit the West Bank, to securing information regarding a family member who was detained, to shortening the period in which a

17 H.C.J. 9132/07 Jaber al-Basyuni Ahmed and Others v. The Prime Minister (Decided 30 January 2007).
19 In H.C.J 2150/07 Abu Tcifiya v. The Minister of Defense the Court refused to issue interim measures freezing the order that prevented Palestinians from using a West Bank road the Military Commander designated for Israelis. The case is still pending, but the Court issued an interim decision suggesting that building alternative roads for Palestinians might be a reasonable solution; the Court has refrained from ruling in two cases filed in 2003 that challenged the ‘permit system’ regime. This latter set of military orders prohibited Palestinians from entering the ‘seam zone’ (the area between the separation barrier and the armistice line known as ‘the Green Line’) unless they asked and received a permit (H.C.J 9961/03 HaMoked: The Centre for the Protection of the Individual v. The Government of Israel et al.–the author is one of the lawyers for the petitioner in this case, and H.C.J 639/04 The Association for Civil Rights in Israel v. The Military Commander).
detained person is barred from meeting an attorney. Securing rights ‘in the shadow of the Court’ is a common phenomenon. Here is an example. According to the statistics gathered by the Israeli human rights NGO, Hamoked for the Protection of the Individual, 75 percent of petitions filed by the organization on behalf of Palestinians who were denied permits to exit the West Bank, ended up with the administration issuing a permit without the need for a court ruling.

Another group of cases that might result in petitioners’ success, this time through a Court ruling, are the ‘proportionality’ driven cases. In recent years, the Israeli Court has shifted much of the legal onus from the issue of legality of the means under review to the question of proportionality of its use in the specific case. The Court has done so, with regard to the route chosen for the construction of a separation barrier;\(^{20}\) the practice of closing lands and assigning only special days for cultivation;\(^{21}\) and even with respect to the Israeli policy regarding assassinations.\(^{22}\) When proportionality becomes the main concern, the Court may intervene and demand the army lessen the damage to the petitioner while the damaging practice or policy is approved. And these judicial interventions may be significant. For example, when the proportionality test was applied by the Court in the case of the separation barrier, the Government and the army were forced to make extensive changes in this wall’s original route, reducing the territory it delineates as the ‘seam zone’ from more than 20 percent of the West Bank to about 8 percent. So, though the Court has legalized the construction of the fences and walls, enabling a project that is catastrophic to the human rights of the neighbouring villages, it has saved for the Palestinians thousands of acres of lands through its ruling in specific cases. No one can take this important result lightly, least of all human rights lawyers.

Cases like these are the reason why Palestinian petitioners have continued filing petitions to the Court, even though statistics show that their chances of abolishing abusive policies are very slim.

The Arithmetic of Human Rights Litigation

The lose-and-win balance, as sketched above, raises a question: Why are the authorities ready to compromise ‘in the shadow of the Court’ when reality shows that the Court rarely, if ever, decides in favour of the Palestinian petitioners?

Some suggest that the Court’s considerable moral power and influence give rise to self-censorship, of sorts, among military officials and their legal

\(^{20}\) H.C.J. 2056/04 Beit Surik v. The Government of the State of Israel; H.C.J.7957/04 Marabe v. The Prime Minister [the author was one of the lawyers acting on behalf of the petitioner in this case].

\(^{21}\) H.C.J 9593/04 Morar v. The Military Commander, mainly Paragraphs 17–27

\(^{22}\) H.C.J 769/02 The Public Committee Against Torture in Israel v. The Government of Israel [the author was one of the lawyers acting on behalf of the petitioner in this case].
councils. The latter fear the Court’s criticism even when the petitions are dismissed on their merits. Others point to the state lawyers’ image of the Court and their image of themselves. State attorneys view the Court as a ‘last Israeli barrier against arbitrary breaches of human rights.’ They view themselves as liberal ‘good guys’. The first image deters them from going to court and the second provokes an internal objection to the military position or a desire to aid the petitioner *ex gratia* (Dotan, 1999: 319). In both cases, the readiness to compromise has nothing to do with the realistic prediction of Court outcome.

Ketzmer (2002: 190) points to the great prestige of the Supreme Court justices in the eyes of the Israeli political and legal elite and presents it as one of the reasons why the authorities are susceptible to judges’ pressure. In addition, Ketzmer (2002: 190–191) suggests that for the authorities the price of losing, unlikely as it may be, is much higher than the rewards of winning. But all this, it seems, is only a small part of the story. One should also consider the possibility that petitioners’ success, be it in ‘the shadow of the Court’ or in actual court rulings, is important for the authorities too, albeit for different reasons.

Deciding who gains and who loses from settlements ‘in the shadow of the Court’ and Court declarations of specific actions as disproportionate is quite a complex project. On the face of it, the successful petitioners should be satisfied with the outcomes of their cases since they got at least part of what they asked for in their petition or pre-petitions. But is the game they are playing a zero-sum game? Is the petitioner’s success automatically tantamount to the authority’s loss? One should ask whether petitioner victories do not supply (at least part of) the oxygen that enables the occupation to operate.

At this point, it is important to remind ourselves that the human rights perspective on the question at hand requires that the implication of court proceedings be evaluated not only on the basis of their contribution to the rights of the specific petitioner, but also with regard to their impact on the durability and sustainability of the occupation itself. Indeed, when the Court option is assessed according to the criterion of its potential for putting an end to, or at least shortening, the ‘shelf life’ of the occupation, both winning and losing in court may have significant implications of a general nature.

**Legitimacy is a commodity**

The first potential danger is that of calming parts of the resistance to occupation. Court proceedings, and especially petitioners’ success, suggest that Palestinians have recourse to justice. The existence of a court system entitled and capable of dealing with petitions from the occupied population implies that the occupying regime has, to some extent, rules that are democratic in their nature and tools that help combat arbitrariness. These understandings create a sociological and psychological process of transference of moral responsibility from the individual (Israeli or foreign) to the justice system. It
provides liberal elites, those who identify themselves with Menachem Begin’s famous saying ‘there are judges in Jerusalem’, with the cure for ‘occupation headaches’.

But the implications of court proceedings in occupation related cases – in the occupier’s Court – go much further. Human rights litigation in the abuser’s court is a type of internal opposition. It is internal because it is a (legal) campaign fought in the abuser’s institutions. As such, it is bound to use and recycle at least some of the abuser’s narratives and concepts. Good examples of such internal opposition are dozens of petitions against different segments of the separation barrier filed in the Israeli Court. The Court accepted the government’s claim that the motivation for construction of the barrier was security. It ruled that when security is at stake, the army does have the authority to erect a barrier in the occupied territory. The petitioners were charged with the task of proving that an alternative route, one that is less damaging for them, did not jeopardize security. The discussion in Court focussed, as the government wanted, on the security of Israeli and the ‘war against terror’, rather than on the limits of military powers that violate rights of the occupied. The evidence indicating the Israeli desire to grab as much Palestinian land as possible and de facto annex it to Israel did not cross the Court’s threshold.

In parallel with the proceedings in the Israeli Court, extensive external opposition to the barrier campaign has occurred. External opposition denies the legitimacy of Israeli institutions to arbitrate conflicts between Palestinians and the occupation forces; it denies the abuser’s claim that it has the right to make unilateral decisions on the subject matter, that it is an ‘internal’ affair. External opposition also rejects the abuser’s discourse, which in the Israeli case places Palestinian terror as the grounds for its policies. External opposition thus lobbies authorities who are external to the abuser (i.e. legal systems of other countries, international tribunals, external political channels, and even foreign public opinion), and it sticks to a rights-based narrative, refusing, in the Israeli example, to adopt the ‘war on terror’ discourse. A good example of external opposition activity in the campaign against the construction of the separation barrier is the Palestinian Authority-led UN General Assembly referral of the legality of the barrier to the International Court of Justice (ICJ) for its advisory opinion. Another example is popular protest in the form of demonstrations, accompanied by clashes with the army that took place at barrier construction sites. Protestors in those clashes used civil disobedience techniques such as chaining themselves to olive trees marked for uprooting and mass sit-ins in front of the bulldozers, to prevent the construction of the barrier. They did so even when the Israeli institutions have made their final ruling on the matter, and they directed their appeals to the international community.

The capability of internal and external opposition to bring about the desired effect changes from one case to another. Their effectiveness depends,
among other factors, on the nature of issues at stake, on the identity of the abuser, and on its political status and power. For example, the ICJ’s declaration of the separation barrier as illegal, the world-wide condemnation of its construction and the frequent public protests and demonstrations did not bring any tangible success. This activity might have an important impact on international public opinion, but it brought very little measurable change. This failure might be attributed to Israel’s might in international politics and to the international community’s inability to combat even the most brutal violation of international law committed by a close American ally. On the other hand, internal opposition in the form of petitions filed with the Israeli Court has brought about, as mentioned before, a significant change in the route. In this case, the effect of internal opposition is tangible and measurable.

This said, internal opposition has an undesirable side-effect: it legitimizes the abusers’ narratives and their claim for sole authority over the subject at hand. Thus, successful internal opposition in the separation barrier context is not only a ‘cure for occupation headaches’, but also a direct provider of legitimacy to the occupation regime. Viewed from this perspective, the barrier cases contributed to the occupation’s durability. As a matter of fact, it is questionable whether legitimacy is merely an offshoot of internal opposition. Whenever legitimacy is in short supply but in high demand, as in the case at hand, it becomes a commodity and the regime, its courts included, is ready to pay for it in rights. The relative success in separation barrier cases was, in fact, a process of bartering legitimacy for land and of trading recognition for soil and for groves. Indeed, in times of conflicts, legitimacy is a commodity.

To win or not to win?

Internal opposition may legitimize abusive practice under review and the regime’s narratives. Both serve as power injections for the regime. But if the human rights lawyer wins and saves his client’s rights, maybe all this is worthwhile?

Let us consider an example: the ‘seam zone’s’ permit system prohibits Palestinians from entering the zone unless they ask for and receive a permit, but keeps the zone open to Jews and foreigners. Many Israeli human rights lawyers think that this system of legal and physical fences and walls, separating Palestinian farmers from their lands and from their relatives, is a new...
version of the crime of apartheid. Yet, they have decided time and again in recent years to appeal on behalf of their Palestinian clients for changes in the route and for an extension of the zone’s gate opening hours. Their dilemma is painful: they may go to court and they might even win (in ‘the shadow of the Court’ or through a Court declaration that the current route or gate opening hours damage Palestinian livelihood ‘disproportionately’ to the security advantage gained). Success means their clients, the farmers, will be able to pass through the military fences and that their livelihood is secured. But it also means improving the ethnic separation system and ensuring its efficiency. It means contributing to the barrier’s workability. The alternative is to boycott the occupier’s court and justice; not to supply any legitimization to what the human rights lawyer believes to be a blatant abuse of human rights and dignity.

But the human rights lawyer’s dilemma is even more complex. Arguably, internal opposition may lead, eventually, to a symbiosis between resistance movements and the authorities. The authorities need internal opposition to better assess the feasibility and ease of implementing its policies. It needs human rights litigation as a policy ‘fine-tuner’. This insight is overwhelming: the opposition, when it uses only internal means of combat, becomes part of the practice to which it objects. Its resistance is nicely boxed and is given an official role as a phase in the policy structuring procedure. Seen from this angle, the separation barrier with its gates, walls, and permit system is a joint governmental–petitioner project.

The human rights lawyer’s dilemma is a deadly one. The lawyer’s question is not just ‘is my existence a barrier to injustice and to human rights violations?’ but also: ‘am I nothing but a collaborator of this huge mechanism, which needs me to occasionally soften the sharp edges of the military domination and hence enable the occupation to operate?’

The human rights lawyer demands to know whether in winning he or she is actually losing and whether the petitioner successes are, in fact, what makes the occupation tick.

**Academics and Practitioners**

This analysis leads to depressing conclusions. Limited success perfects the occupation and makes it sustainable; moreover, by lodging petitions to the Israeli Court, human rights lawyers act as public relations agents of the occupation by promoting the notion that Palestinian residents have a resource to justice.

This dilemma is not unique to the Israeli–Palestinian conflict. In recent years, American human rights lawyers have been waging internal legal battles to secure the rights of Guantanamo Bay detainees. The time-honoured rule denying American courts jurisdiction over US forces operating beyond US borders has been eroded and is on the verge of being overturned. The United States Supreme Court has insisted that American
courts have judicial review powers over Guantanamo Bay detentions even after Congress and the President decided to replace them with special tribunals. These developments are creating a new field for internal legal battles. Similar dilemmas might also arise in the context of the American occupation of Iraq and Afghanistan.

It is difficult, maybe even impossible, to persuade a human rights lawyer not to use an open legal path on behalf of an individual whose rights are violated. Lawyers in general and human rights lawyers in particular, are programmed to act on behalf of individuals and to fight for the rights of their clients alone. The family who was reunited after years of separation does not care whether their rights were eventually recognized by court, out of court, or ‘in the shadow of the Court’. The farmer whose olive grove, and thus his livelihood, was saved does not think of the legitimizing affect of court proceedings. Professional ethics compels lawyers to use any legal means available to guard the rights of their clients. And one should not forget the moral considerations that prevent the human rights lawyer from sacrificing the interest of his or her individual client for the sake of the ‘collective struggle’. Isn’t the chance of saving one person’s liberty, tiny as this chance may be, worth the price of all the abovementioned ramifications of the court’s jurisprudence?

The lawyers’ ethical code shifts the onus of finding the answers to the academics. Legal sociologists and legal philosophers, unfettered by the constraints of legal practice, may and should provide lawyers and the court with a better understanding of the role of human rights internal opposition via litigation in shaping large scale rights abusing regimes. Academics have the privilege – and obligation – to rise above the specific case or client. They can and should zoom out and inspect the internal legal battlefield from a high altitude, where a single victim cannot be identified, but trends and systematic failures may be revealed. A serious academic discussion will help the human rights establishment to understand better the processes of which it is a part and to see the prices we are all paying for choosing to engage in internal opposition legal campaigns. Moreover, by uncovering the truth about the limited success of human rights victims in a given legal system, and by pointing to the processes that transform these limited successes into regime-empowerment tools, academic debate is likely to weaken those tools. Since at least some of the perils listed above are vested in the image-creating

25 Rasul v. Bush, President of the United States, et al. Nos. 03-334 and 03-343, decided on 28 June 2004. The United States Supreme Court has ruled that the ‘respective jurisdictions’ of Courts in the federal habeas corpus statute relate to the area where the officials responsible for the detention are present rather than the areas where the detainees are held, thus enabling jurisdiction to American federal courts.
force which internal opposition grants the regime, revealing them may defuse
their sting. This can only be done by academics. And they have failed to do
so for all too long.27

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27 A rare attempt to tackle these questions, in addition to Ketzmer’s (2002) book, is to be
found in Ben-Naftali (2009).
The Public Commission to Examine the Maritime Incident of 31 May 2010
The Turkel Commission

SECOND REPORT

Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law

FEBRUARY 2013
SUMMARY OF THE CONCLUSIONS AND RECOMMENDATIONS

In this Report the Commission reached the following recommendations and conclusions:

Recommendation No. 1: ‘War Crimes’ Legislation

1. The Ministry of Justice should initiate legislation for all international law offenses that do not have a corresponding domestic offense in Israeli criminal law.

2. Moreover, the Commission regards as important the specific inclusion of international ‘war crimes’ norms in Israeli domestic legislation. The accepted approach in the countries surveyed is to enshrine international criminal offenses in domestic legislation.

Recommendation No. 2: Responsibility of Military Commanders and Civilian Superiors

3. Legislation should be enacted to impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the attention of the competent authorities when they became aware of the offenses after the event.

Recommendation No. 3: Reporting Duties

4. The 2005 Reporting Procedure determined by the Chief of Staff, following an undertaking to the High Court of Justice, has not been implemented. The Reporting Procedure should be incorporated into the Supreme Command Orders and shall apply to every incident involving the
IDF or forces for which the IDF is responsible. The Reporting Procedure should be implemented and sanctions should be imposed on commanders who do not comply with it.

5. The Reporting Procedure should require documentation of the scene of an incident. This obligation includes seizing all exhibits and documents that may assist the examination and investigation, and storing the exhibits (such as clothing, ammunition or weapons) in conditions that will best preserve them for proper examination at a later date.

**Recommendation No. 4: Grounds Giving Rise to an Obligation to Examine and Investigate**

6. The Investigation Policy in the IDF, whereby a CID investigation is not begun immediately following the death of a person during combat operations unless there is a reasonable suspicion that an offense has been committed, is consistent with Israel’s obligations under international law. However, this policy is not properly enshrined in Israeli law. It should therefore be enshrined in appropriate rules and guidelines.

7. In order to expedite the investigation of complaints, initial reports should be classified according to the legal framework of each incident, namely whether the incident occurred during combat operations and is therefore subject to the rules regulating hostilities, or whether it is it any other incident subject to law enforcement norms.

**Recommendation No. 5: Fact–Finding Assessment**

8. An operational debriefing is not designed for deciding whether to begin an investigation. A mechanism should be established for carrying out a fact–finding assessment, which should form the basis for the MAG’s decision as to whether an investigation is necessary. For this purpose a
special team shall be established in the IDF with expertise in the theatres of military operations, international law and investigations. The function of the team will be to provide the MAG with as much information as possible, within a period of time stipulated in procedures, in order to enable the MAG to decide whether to begin an investigation.

9. The fact–finding assessment should include, insofar as possible, the questioning of complainants and additional witnesses that are not military personnel.

Recommendation No. 6: The Decision on Whether to Open an Investigation

10. Procedures should establish a timeframe of a few weeks during which the MAG decides whether to begin an investigation on the basis of the material in his possession.

11. The MAG’s authority to order an investigation should not be made conditional upon consulting the commanding officer responsible for the unit involved in the incident, but the MAG should be allowed to consult any commander as he sees fit.

12. Every decision of the MAG not to open an investigation should state the reasons for the decision.

13. At the end of an examination process and at the end of a CID investigation, irrespective of the outcome, the MAG should consider referring the relevant material to the commanding officers.
Recommendation No. 7: Independence of the MAG

14. The fact that the MAG is subordinate to the authority of the Attorney–General in professional matters is consistent with the principle of independence as established in international law. However, legislation and organizational arrangements are required in order to safeguard this subordination (see below).

15. The MAG should be appointed by the Minister of Defense, upon the recommendation of a public professional committee. In order to institutionalize the professional subordination of the MAG to the Attorney–General, the latter should be the chairman or a member of the public committee.

16. The MAG’s term of office should be fixed, like that of the Attorney–General, at one term of six years without any possibility of extension. The MAG should also be given a fixed rank.

Recommendation No. 8: The Military Advocate General’s ‘Dual Hat’

17. In order to prevent any appearance of partiality due to the MAG’s dual hat – as head of the military prosecution and as the chief legal advisor to the military – the status and independence of the Chief Military Prosecutor (CMP) should be strengthened.

18. The CMP should be appointed by the Minister of Defense, upon the recommendation of a committee chaired by the MAG. The CMP’s term of office and rank should be determined in advance.
Recommendation No. 9: CID Investigations

19. A Department for Operational Matters should be established in the CID to work with the MAG Corps for Operational Matters with bases in the areas where the incidents under investigation occur. The investigators should include persons that are fluent in Arabic.

Recommendation No. 10: Establishing the Investigation Timeframe

20. The MAG, in coordination with the Attorney–General, should set a maximum period of time between the decision to begin an investigation and the decision to adopt legal or disciplinary measures or to close the case. The MAG should publish, at least once a year, statistical data on the period of time taken to handle cases.

Recommendation No. 11: Transparency of Proceedings

21. The arrangements provided in the Rights of Victims of Crime Law, 5761–2001, relating to the receipt of information on criminal proceedings should also be applied, mutatis mutandis, to persons injured by law enforcement operations of the security forces that are investigated by the CID.

22. The MAG Corps should implement a strict documentation procedure for all examination and investigation actions carried out in a file and for all the decisions made, especially in cases involving investigations of alleged violations of international humanitarian law.

Recommendation No. 12: Oversight of the Legal Advice given by the MAG Corps

23. In order to strengthen the Attorney–General in exercising his
oversight powers over the legal advice given by the MAG, a unit specializing in international humanitarian law should be established in the Advice and Legislation Department at the Ministry of Justice.


24. Legislation should provide a procedure to appeal decisions of the MAG to the Attorney–General. This legislation should determine the period of time for filing an appeal and for the Attorney–General to make a decision.

25. When the Complaints Commission for the civilian Prosecution is established, it should be authorized to review all the branches of the military prosecution, including monitoring the bodies of the IDF that conduct examinations and investigations, in order to ensure that the MAG’s regulations and policy are being implemented de facto.

**Recommendation No. 14: The Handling of Complaints against Police Officers**

26. The examination and investigation of complaints against police officers operating under IDF command for violations of international humanitarian law in the West Bank should be carried out by the IDF, rather than by the Israel Police or by the Police Internal Investigation Department at the Ministry of Justice.

**Recommendation No. 15: The Handling of Complaints against Israel Security Agency Interrogators**

27. The role of the ISA Interrogatee Complaints Comptroller should be transferred from the ISA to the Police Internal Investigation Department at the Ministry of Justice.
28. All ISA interrogations shall be fully videotaped, in accordance with rules that will be determined by the Attorney–General in coordination with the head of the ISA.

**Recommendation No. 16: The Handling of Complaints against Wardens**

29. The head of the Investigations and Intelligence Department at the police should ensure that during investigators’ training, proper emphasis is placed on the relevant rules of international law.

**Recommendation No. 17: The Handling of Complaints against the Civilian Echelon**

30. The system of investigating senior decision makers by commissions of inquiry and examination, which is well established in Israel, satisfies Israel’s obligations under international law to investigate acts, decisions or omissions that give rise to a suspicion of serious violations of international humanitarian law.

**Recommendation No. 18: Implementation of the Commission’s Recommendations**

31. The MAG should publish a comprehensive and updated handbook for the examination and investigation mechanisms in the IDF. The handbook should lay down guidelines for the examination and investigation mechanisms with regard to the handling of complaints and claims of violations of international humanitarian law. The MAG’s guidelines should incorporate the guidelines and procedures that will be formulated pursuant to the recommendations of this Report. The handbook should be available to the public.
32. The Commission recommends that the Prime Minister should appoint an independent implementation team that will monitor the implementation of the recommendations in this Report and report periodically to the Prime Minister.
“Law and Politics: Options and Strategies of International Law for the Palestinian People”

An International Law Conference organized by the Birzeit University Institute of Law, the Civic Coalition for Palestinian Rights in Jerusalem and the Decolonizing Palestine Project and convened at the University of Birzeit on 8 – 9 May 2013

Summary of Proceedings and Outcomes

Prepared by the organizing committee, July 2013

I. Introduction: the conference and the follow-up process

II. Conference proceedings

1. Methodology

2. Presentations (inputs) by the speakers

III. Main outcomes of the debates

1. Main issues debated, including differences of opinion and points of agreement

2. Issues and practical steps suggested for the follow-up process
I. Introduction: the Conference and the Follow-up Process

Aims and objectives

This conference aimed to create space for Palestinian academics, human rights activists and political actors to discuss options and strategies of international law from a theoretical and practical perspective. It was to critically reflect on the impact and limitations of the international humanitarian law (IHL) paradigm that has dominated discourse and policy on Palestine for the past 45 years, and to examine alternative legal frameworks which are more appropriate for the analysis of Israel’s oppressive regime. Finally, and on this basis, the conference was to discuss legal strategies, including mechanisms and practical steps, which can build respect of the human rights of the Palestinian people, in particular the rights to self-determination and reparation, and of the respective international obligations of Israel and third parties.¹

The conference specifically aimed to:

- Increase the legitimacy, visibility and support of the debate about alternative international law paradigms;
- Examine possible practical strategies, including risks, and build consensus among the participants about the appropriate legal analysis, strategies and actions;
- Motivate participants to engage in follow-up activities to be implemented after, and separately from, the conference.

The conference

An audience of 350 persons, mainly Palestinians attended the conference, among them 60 specially invited Palestinian guests who participated in closed roundtable discussions on the second day. Palestinian participants represented the distinct mix of target groups required for achieving the aims of the conference. Palestinian human rights lawyers, staff of Palestinian human rights organizations, members of Palestinian political parties and activists in civil society campaigns and youth movements engaged in discussion with Palestinian academia and officials. This, and the fact that participants came from a variety of geographic areas, including the northern and southern West Bank, Jerusalem, 1948 Palestine/Israel and the Gaza Strip (via video conference), gave the conference a distinct character which was noticed positively by many. Participation of a group of Palestinian academics and activists from Beirut (via Skype) had to be postponed for the follow-up process in order to keep logistics and the number of discussants at a manageable level. Unfortunately (but not entirely unexpected), PA and PLO leadership responded to the conference invitation only partially: although several, including the PLO Department of International Relations and four ministers attended the first day, only legal advisers of the Ministry of Foreign Affairs and staff of the PLO Negotiations Support Unit (NSU) participated also in the in-depth roundtable discussions on the second day.

The debates at the conference showed that in-depth discussion and consensus-finding on legal frameworks, strategies, mechanisms and practical steps was difficult mainly for three reasons:

i) the large number and diverse background of the participants;
ii) the fact that the issues raised by the conference were new for many participants who do not usually apply legal concepts and frameworks in their activities. The

majority were unaware of the meaning and limitations of certain concepts in international law and/or the way in which legal concepts and frameworks are used, re-interpreted and developed internationally and applied to the case of Palestine. Hence, they could not easily see how international law can be used for practical legal and political strategizing; and,

iii) the wide-spread frustration and sense of powerlessness vis-à-vis the Palestinian leadership which is perceived as unaccountable to its constituency and unwilling to engage and support initiatives coming from civil society.

Nevertheless, the conference resulted in agreement on some basic issues pertaining to the merits of the legal frameworks of colonialism and apartheid, the principles that should guide a new Palestinian strategy and the use of international legal mechanisms such as the ICJ and ICC. Participants also identified issues which remained little understood, controversial or undecided and in need of further study, and suggested some practical steps that should be taken in the follow-up to the conference. All of these are described in detail in this report.

**Follow-up and next steps**

Planning of the follow-up process was started immediately after the conference in order to take advantage of the opportunities created. The broad and diversified participation in the conference had shown that Palestinians recognize the importance and urgency of the conference agenda and contributed to public visibility of the debate. Visibility and legitimacy of the debate about appropriate legal frameworks and strategies have also been enhanced by the extensive reference to the conference by the UN Special Rapporteur on Human Rights in the OPT Richard Falk in his latest report to the UN Human Rights Council.

Two months after the conference, follow-up activities are implemented at two levels:

**Development of a practical plan of action based on the suggestions from the conference**

Consultations undertaken by an informal working group composed of members of the conference organizing committee, speakers, chairs and participants, as well as other Palestinians committed to the common agenda. A series of meetings for this purpose was launched on 2 July 2013, with the aim to:

- Reach agreement about activities to be implemented, including prioritization in terms of timing and resources;
- Agree on modalities and mechanisms of implementation (who, when, how);
- Adopt a mechanism for coordination.

**Publication of the conference documents by the organizing committee:**

- Conference proceedings and outcomes (English and Arabic) to guide and support the follow-up process;
- Preparation of the BZU Palestine Yearbook of International Law (2014), which will be dedicated to the theme of conference and include the papers presented by the speakers.

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II. Conference Proceedings

1. Methodology

The conference was implemented as a two-day event hosted by the Birzeit University Institute of Law on 8–9 May 2013. The first day was open to the public; the second day was conducted in two closed roundtable discussions with specially invited participants. It was agreed that participants in the roundtables on day-2 would not be cited and that sessions would not be recorded.

On day-1 (public conference, 8 May), expert inputs in form of substantial presentations were provided by the speakers who are international scholars and Palestinian lawyers renowned for their work on issues relevant for the conference agenda. Two speakers (Richard Falk, Anis Kassim) who could not obtain entry permits to occupied Palestine from the Israeli authorities gave their presentations via Skype. Presentations were followed by discussion with the audience. Closing thoughts about day-1 were presented by Diana Buttu, who also served as rapporteur of the public conference. (For the program of the public conference, see: http://lawcenter.birzeit.edu/iol/en/index.php?action_id=106&id_legal=616)

Speakers also provided input and served as resource persons in the two closed roundtable sessions on day-2 (9 May). Participants in the roundtables were asked to examine the international law frameworks of colonialism and apartheid, as well as strategies and mechanisms (ICJ, ICC, and others) which were presented as possible options on day-1, and to assess their merits and risks in challenging Israel’s oppressive regime over the Palestinian people and advancing the right to self-determination, including the right of return of the refugees. Participants were also asked to propose practical steps which should be taken after the conference.

A group of 10 persons from the Gaza Strip, including academics and human rights activists, participated in the first roundtable discussion through a videoconference hosted by PNGO. The roundtable discussions were documented by Ziyaad Lunat in his role as rapporteur of day-2. (Copies of the program of day-2 are available upon request.)

The issues debated in the conference, in particular in the roundtables on day-2, constitute the main immediate outcomes of the conference. They include differences of opinion and points of agreement, as well as questions and practical steps identified for the follow-up process (see below, section III). These outcomes will guide the planning of the follow-up process.

2. Presentations (inputs) by the speakers

<table>
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<th>Session I - IHL Globally, Reflections regarding Palestine</th>
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<td>Richard Falk:</td>
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Falk noted that IHL sets limits on the actions of states in the context of belligerent occupation with the aim of protecting civilians. These protections and limitations came after the close of the Second World War as an attempt to fill in the gaps that existed in IHL before the Geneva
Conventions were enacted. However important the attempts to extend IHL protections to civilians, Falk noted that there are two central weaknesses in IHL which have limited the benefits also for Palestinians:

All laws of war tend to be subordinated to the imperatives of military necessity under battlefield conditions. As such, the notion of security in practice trumps the constraints imposed on belligerent occupiers and the protections accorded by IHL, although if the political conditions existed for ensuring compliance, the clear and unqualified constraints of the Fourth Geneva Convention would be upheld.

While all parties to the Fourth Geneva Convention have an obligation to ensure its implementation (Article 1), states have lacked political will to ensure that the articles and principles are upheld, despite Israel’s flagrant, repeated and systemic violation of fundamental rules and principles set forth in the treaty.

Falk also asserted that the language of the Fourth Geneva Convention, although setting forth valuable guidelines even in situations of prolonged occupation, was never fully adequate to the situation confronting Palestinian living under occupation. Israel from the outset of occupation had designs to incorporate East Jerusalem, appropriate water from Palestinian aquifers, and build settlements, which with the passage of time has created a variety of circumstances that make an end to the occupation impossibly difficult to achieve through diplomatic means.

Falk presented three frameworks for addressing the Palestinian situation:

(1) The Oslo paradigm, in three variations. First, it is the deficient text of the Oslo agreements, without reference to Palestinian self-determination and statehood; no Israeli obligation to withdraw and excluding many rights under international law. It must be noted that the assumption was that these agreements would be valid for five years only. The second version is the political reality created, which is a hybrid of annexation, apartheid and prolonged occupation, without any end to occupation in sight. Finally, there is the daily reality on the ground, characterized by non-compliance with the Fourth Geneva Convention and fragmentation of the territory under occupation in forms inconsistent with the protection owed to the civilian population.

(2) Positive law, i.e., existing treaties such as the Fourth Geneva Convention and its Additional Protocol. This framework is useful for exposing the unlawfulness of specific practices of the occupying power, and for challenging the legitimacy of Israel’s actions – as done, for example, in the ICJ advisory opinion on the Wall. The problem with the positive law framework is that it tends to reinforce the perception that the conflict is exclusively about territory, leaves out many rights of Palestinians (the refugees, for example), and doesn’t address the right-less circumstances of the population when occupation doesn’t end after a reasonable period of time.

(3) Prolonged occupation, i.e., an occupation lasting more than five years. This framework allows us to ask all the important questions: at what point does an occupation assume the character of a de facto annexation? Should an occupation extended beyond five years automatically impose an obligation to withdraw from the territory or establish the rule of law in accordance with international human rights law? At what point does a
regime that doesn’t allow the civilian population any benefit from the rule of law become a system of apartheid? And to what degree does the occupying power’s policy of changing the demographic composition correspond to ethnic cleansing? Such circumstances should result in a new legal regime that protects the rights of the Palestinians, with a convention and an ombudsman to oversee implementation.

Falk recommended that the notion that the language of positive law is sufficient to describe the Palestinian experience with what is best characterized as Israeli settler colonialism should be abandoned. He suggested that the legal framework should be enhanced by combining positive law with the framework of prolonged occupation, and that further recourse to the ICJ for a clarifying advisory opinion might be useful at this stage.

Session II – Historical Development of the IHL Paradigm in Palestine

Charles Shamas:

Shamas explained that his involvement with IHL began with his work at al Haq and Mattin, and that it was clear at the time that Israel’s practices in the OPT where part of a colonial policy that dated back at least to the 1930s. He noted that IHL was initially seen as an important set of promises which states had made, and as an important tool for protecting the Palestinian victims of Israel’s practices, such as the settlements, forced displacement and deportation.

Shamas emphasized the need to treat law as an instrument which can be used to compensate for the lack of power to enforce respect of Palestinian rights. Therefore, legal claims must be addressed to parties who recognize that they have obligations, such as courts, public opinion and third states, and they must be formulated in a manner that will compel them to act on their obligations.

He argued that the IHL paradigm has become an obstacle because of mistakes made. He noted that in retrospective the biggest mistake is to assume that we can get Israel to respect Palestinian rights by invoking its obligations under IHL, international human rights law or the UN Charter. This is impossible, because the claim of sovereignty over the entire British Mandate Palestine is incorporated into Israel’s domestic law and prevents de jure application of the law of occupation by Israel.\(^3\) Another mistake is to call on states to act in order to get Israel to comply with IHL, instead of invoking the responsibility which is most widely recognized, i.e. the responsibility of every state not to recognize nor render aid or assistance to the unlawful situation created by Israel. The lesson learned is that we should help states identify their own violations of this obligation and what they must do in order to operate lawfully. In this way we can raise the cost paid by Israel for maintaining its own paradigm.

With regard to the historical process in which IHL became sidelined, Shamas noted that by 1991 the U.S. was able to convince the Palestinian leadership to drop the demand for enforcement of the Fourth Geneva Convention – i.e., the demand for “regulation of the occupation” - in

\(^3\) See, Area of Jurisdiction and Powers Ordinance, No. 29 of 5708-1948, at: [http://israellawsresourcecenter.org/israellaws/fulltext/areajurisdictionpowersord.htm](http://israellawsresourcecenter.org/israellaws/fulltext/areajurisdictionpowersord.htm). This law is still valid, although an amendment of another law enacted by the Knesset on 27June 1967 (Section 118 of the Law and Administration Ordinance) gave the government a choice whether or not to incorporate the 1967 occupied areas into the state.
exchange for a promise that the Madrid-Oslo process would end the occupation. Other states and the EU were, thus, no longer compelled to think about what they would have to do in order to comply with their own IHL obligations, but were offered the alternative of accepting what the parties had agreed upon in the negotiations.

Allegra Pacheco:

Pacheco pointed out that the main problem with IHL is that it is an instrument to regulate occupation. Occupation *per se* is not illegal, the rights of the occupying power are weighed against the rights of the occupied population, and many privileges are granted to the occupier.

Pacheco traced the historical development of Palestinian positions and demands. She pointed out that the current situation where Palestinian rights are limited to the rights protected by the Geneva Convention represents an almost complete turnaround from 1948 – 1967, when Palestinians held that partition of Palestine (UN Resolution 181 of 1947) violated the right to self-determination, demanded full repatriation and implementation of Universal Declaration of Human Rights and focused on the right to resistance.

While noting that IHL provides basic protections and sets restrictions on an occupying power, including important prohibitions such as the prohibition on collective punishment, Pacheco argued that it was important to recognize the limitations to IHL:

1. No mechanism to reduce the privileges of the occupying power, and no standard to end or outlaw occupation; IHL grants indefinite privileges (e.g., in Area C and the use of expropriated land)
2. Palestinian self-determination is suspended
3. Only partial protections are provided
4. Enforcement depends upon the will of state parties
5. Reinforces the fragmentation of Palestine and the Palestinian people

Pacheco suggested that IHL continues to be the dominant framework because it validates the existing role of the PA and international assistance, provides a justification for sidelining the debate about other legal frameworks, and allows parties to continue to adopt a “wait and see” approach.

Pacheco concluded that IHL is not enough for moving forward, and that there is a need for new legal frameworks which make the occupation illegal, criminalize Israeli practices, and support unification of Palestine and Palestinians. She recommended three possible frameworks to be considered: self-determination, the Apartheid Convention, and the Declaration on Granting Independence to Colonial Countries and People.

Mudar Kassis:

Kassis pointed at some of the fundamental flaws of international law in general. One problem is the lack of separation of powers: the same states that create international legal instruments are also charged with implementing them. Another problem is that all states are not equal, with some states enjoying veto power in the UN Security Council. This results in a situation where powerful states shape international law and implement it in line with their interests.
Kassis concluded that Palestinians have seen little enforcement of international law for these reasons, and that international law is of limited use for the Palestinian struggle against Israeli colonialism.

Session III – What is International Law’s Role in Liberating Palestine?

Stephanie Koury

Koury reflected on (the absence of) international law in the peace negotiations, based on her experience in the PLO’s Negotiation Support Unit (NSU) which is a donor supported unit set up to provide technical legal support to final status negotiations.

She noted that the main flaws in the negotiations were certainly the lack of a law in the negotiating framework, citing as one example the Clinton parameters which suggested a political solution based on percentages of what was to be Israeli or Palestinian. The overall approach was defined by what Israel considered to be practical, and there was immense pressure on the Palestinian negotiating team. The NSU did not have an overall legal framework of self-determination; it rather applied international law separately to the various areas of negotiations. It tried to establish certain principles, but this was watered down over time by pressure from third states.

Koury focused on the period of 2002 – 2004, when she worked with the NSU. At that time, there were no final status negotiations but a situation of crisis. The Mitchell Commission was set up by the international community to find a way to end violence and go back to negotiations. The NSU tried to insert law and focused on settlements as cause of violence. In the end, there was some success: settlements were linked to violence and a full freeze was called for in the Commission’s report. However, when it came to implementation, the Palestinian position was undercut by U.S. and Israeli insistence on putting security first. The same approach was then adopted in the Quartet’s Roadmap. Palestinian negotiators tried to get the sequencing changed but failed. All negotiations in this period were with the U.S. only, even the Quartet did not help much to get out of the bilateral framework. For example, there were discussions mainly with the EU concerning the monitoring mechanism on settlement expansion which was called for by the Mitchell Commission. The end result was a U.S. mechanism with confidential reporting.

Koury pointed out that what worked in the build-up to the ICJ advisory opinion on the Wall was that everyone, UN agencies, civil society and leadership, was raising this issue. Although this wasn’t really coordinated, it helped build momentum. The fact that the EU approached the NSU after the ICJ had accepted to take up the case and criticized Palestinians for obstructing the negotiations by choosing to resort to the law is an example of how pressure was applied on the Palestinian side to not rely on legal frameworks. Post ICJ, it was a Palestinian shortcoming that there was no strategy for how to make use of the advisory opinion. There was a lack of commitment by the leadership – the only ones who really used the ICJ opinion was civil society, such as the BDS Campaign for example.

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4 Sessions III and IV were reversed at the conference for technical reasons. Presentations are summarized here in the sequence initially planned.
Koury summarized lessons learned: avoid bilateral talks in the current framework; base negotiations on a coherent legal framework of self-determination; develop a strategy for dealing with pressure; the importance of accountability by the leadership, integration of civil society and best technical advice.

Anis F. Kassim

Kassim noted that the deliberate neglect of international law as a tool for solving the conflict over Palestine, and as an alternative to violence, has been a constant even after the establishment of the International Tribunal on the Former Yugoslavia and the ICC. Kassim asserted that Palestinian leader share responsibility for this neglect.

Kassim explained that, based on personal experience, the reason for the lack of a Palestinian legal strategy is not mainly political pressure, but the fact that Palestinian leaders like all Arab leaders with the possible exception of Egypt, do not know how to use international law as an instrument of politics. He gave the example of how, until 2011, we were told by the PLO that membership in the UN was important, because we could argue that Palestine was an occupied member state and not “disputed territory”, and that this would help to end the occupation. This argument was ill-advised; if it was true, it could have been used by Syria, Jordan and Egypt in the past. More recently, support for the non-member observer state was solicited on the grounds that we could ratify the Rome Statute of the ICC. When observer state status was achieved, we were told that we were going back to negotiations. Kassim emphasized that the only brilliant exception was the ICJ advisory opinion on the Wall. He suggested that the reason why it could go forward probably had to do with the fact that Chairman Arafat was under siege at the time.

Kassim asserted that it is imperative for the Palestinian leadership to utilize the ICJ and ICC, and that the U.S., U.K. or France will most likely not be able to prevent such a move. He also called upon the Palestinian leadership to support private initiatives against Israeli war crimes in domestic courts, as well as the use of international law as a means of building economic and political pressure on Israel as done by the successful BDS Campaign. He recommended that on the diplomatic front in the UN and elsewhere, the credentials of Israeli officials should be challenged, and that Israeli apartheid should be exposed in order to weaken Israel’s legitimacy and international standing.

Session IV – Options and Strategies of International Law for Palestine

John Dugard:

Dugard said that he believes that there are international law mechanisms that can be useful, despite the critique voiced in the earlier sessions on international law in general and IHL in particular. He suggested that the main problem is not the law but those who do not act upon the legal rules, including first of all Israel, but also the U.S., EU, Quartet, the prosecutor of the ICC, as well as the PA which has missed so many opportunities for using the law to the benefit of the Palestinian people.

He explained that he would suffice to say here that there is a system of apartheid in the OPT and focus his presentation on the ICJ and ICC as potentially useful international mechanisms.
ICJ: a second ICJ advisory opinion could be pursued through the General Assembly or through UNESCO of which Palestine is a member. In principle there is enough support within the GA for another advisory opinion, but there are a number of problems and challenges. Back in 2004, the head of the Palestine mission in the UN, Nasser al Kidwa had lobbied hard for states to support the ICJ opinion on Israel’s Wall in the OPT. Now, the first problem would be getting PA support for such a move. The second problem is the question that should be submitted to the ICJ. The Court should be asked to examine Israel’s prolonged occupation, and the question should be as wide as possible. This is a lesson from the 2009 ICJ opinion on Kosovo, where a narrow question resulted in a very narrow opinion. A third issue to be considered is the composition of the ICJ. Unlike in 2004, the current ICJ is not composed of judges with direct knowledge of Palestine and the region. Finally, there is the problem that the credibility of the ICJ has suffered from the manner in which states have ignored the 2004 advisory opinion. It may be reluctant, therefore to give a second, comprehensive opinion.

ICC: a state that is not a party to the ICC may, pursuant to article 12(3) of the Rome Statute, accept jurisdiction for crimes committed in its territory. The PA’s 2009 declaration of acceptance was important in this regard, but the prosecutor took three years to determine that he could not make a decision about whether Palestine was a state. Now that Palestine is a state, the prosecutor could initiate investigation into the settlements as a war crime based on the 2009 declaration. However, she has stated that she will only take steps if Palestine ratifies the Rome Statute, and the PA has been reluctant to do so.

Dugard concluded by reminding of the international consensus that there can be no peace without justice, which is the foundation of the ICC. Palestine has been treated as an exception for obvious political reasons. The opening of ICC investigation into Israeli war crimes would dramatically weaken Israel’s international standing, even if it does not result in prosecution. This can be achieved in a very short term, if the PA can be convinced to adopt a strategy based on law.

**John Reynolds:**

Reynolds explained the background and definitions of several legal concepts and frameworks which allow a more holistic treatment of Israel’s oppressive regime.

Settler colonialism: colonialism was not prohibited by international law at the time the State of Israel was established. The normative shift began only in the 1950s as result of anticolonial liberation movements and the advance of the Third World project at the UN. Colonialism was expressly prohibited in the 1960, when the UN adopted the Declaration on Granting Independence to Colonial Countries and People. Earlier colonial processes in which settler colonial societies had established themselves as nation-states were immunized and normalized by the language of the UN resolutions. The prohibition does not apply within the borders of existing states, even where founded as the culmination of aggression, colonization, ethnic cleansing or genocide (e.g., United States, Australia). Hence, even though Israel can be understood as a settler-colonial state, only Israeli practices in the OPT fall under the international legal framework of colonialism, posing similar limitations as those of IHL. However, the framework allows us to address the systemic elements of the control regime, including settler colonialism’s derivatives of population transfer and apartheid.
Population transfer (ethnic cleansing), i.e., dispossession, deportation and the implantation of settlers that have facilitated the process of colonization: Historically, population transfer was accepted in international law and often recommended as a means of resolving ethnic conflicts and tensions involving national minorities, including in the aftermath of both world wars. At the end of the Second World War, however, forced population transfer was also defined as a war crime and crime against humanity by the Charter of the Nuremberg Tribunal (1945). Subsequently it was prohibited and criminalized under the Fourth Geneva Convention and the Rome Statute of the ICC.

Apartheid: a system of institutionalized discrimination and racial domination, typically arising in a settler colonial context. Although derived from the particular experience in South Africa, apartheid has an international legal status and definition which is universally applicable. The prohibition of apartheid as a state practice is a *jus cogens* norm of international law; the crime of apartheid for which individuals may be criminally responsible is a crime against humanity under the Rome Statute of the ICC. Significantly, in 2012, the UN Committee on the Elimination of Racial Discrimination called on Israel to eradicate any policies of apartheid or segregation that adversely impact Palestinians. The solution to apartheid is ending institutionalized discrimination in order to allow self-determination of the oppressed group. A “one-state solution” throughout the entire territory covered by an apartheid control system is not necessarily the preordained outcome of the end of apartheid, as illustrated by the example of Namibia, whose people exercised self-determination through independence from South Africa.

Reynolds concluded that the frameworks of colonialism, apartheid and ethnic cleansing can be of descriptive and normative value in understanding the entrenched and ideological nature of Israel’s control system. He recommended continuing to move beyond humanitarian law but without abandoning IHL, because these various legal frameworks are not mutually exclusive, and all of them have their own shortcomings. International law has historically been shaped as a product of the European colonial project, and structural biases remain embedded. If international law is to be used in the Palestinian social and political struggle, then, the way forward lies in tying together the progressive elements of the various legal frameworks in a manner that serves a clearly articulated long-term political strategy, including the so-called “legitimacy war”. This must be clearly distinguished from the tactical use of law – pragmatic and opportunistic interventions aimed at short-term results that can contribute towards attainment of the larger strategic goal; for example the use of the legal mechanisms discussed in this conference.

George Bisharat:

Bisharat explained that his presentation aimed to provide guidelines for thinking about an integrated long-term strategy for liberation that is anchored in international law. He emphasized that such a strategy must not be limited by the horizons of current real-politic, and that it must be understood that no strategy is self-executing and requires leaders who are willing and able to carry it out. This requires the fostering of Palestinian leadership that is accountable to the people and the weaning of Palestinians from donor dependency.

Bisharat suggested that an integrated strategy should be developed in a process of careful deliberation along the following guidelines:
It must integrate the rights and interests of all Palestinians: citizens of Israel, external refugees, West Bank and Gaza Strip.

It must not limit legal action to litigation of cases in courts, but also include legislation, action in international organizations, human rights reporting and diplomacy.

It must combine legal action with political action and media work.

It must be integrated vertically through coordination between government, civil society and individual citizens.

He argued that taking time for deliberation will not result in lost opportunities because any political agreement signed with Israel at this point will result in the surrender of substantial Palestinian rights in exchange for a not-fully sovereign Palestinian state.

With regard to integration of all Palestinians, Bisharat argued that it is necessary for three main reasons: (i) it is a moral imperative owed by Palestinians to each other in a situation where fragmentation is increasing; (ii) acting as a collective is an imperative for pragmatic, political reasons, e.g., it allows us to raise demands such as an Israeli equal rights guarantee for all its citizens, and it is required for democratic decision making on political concessions if/when this will be necessary; and, (iii) because a two-state solution is either undesirable or unattainable. He noted that agreement with any one of the three is sufficient reason for adopting a new, integrated strategy.

With regard to integration of legal action, Bisharat noted that litigation has its limitations; no court will render a judgment that has not been earned through political struggle. He presented one example of a legal action that could be taken in the framework of an integrated strategy: an ICJ advisory opinion about whether Israel’s regime over the entire Palestinian people since 1948 amounts to the crime of apartheid. He argued that the Convention on the Crime of Apartheid provides space to review the wide swathe of Israeli practices.

Bisharat recommended that the Palestinian leadership announce the suspension of negotiations and the start of a process of strategic deliberation. In terms of immediate action, he recommended that Palestine take the necessary steps for the opening of investigation into Israeli war crimes by the ICC.

III. Main Outcomes of the Debates

1. Main issues debated, including differences of opinion and points of agreement

1.1 Colonialism, apartheid, forced population transfer (ethnic cleansing): appropriate legal frameworks?

The discussion was initiated by the brief inputs from guest speakers. These inputs included sources defining these legal frameworks, and a summary of their added value in comparison with the IHL framework of occupation:

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Colonialism, apartheid and forced population transfer are legal frameworks which capture the historical experience of the entire Palestinian people. They cannot be applied to the OPT without reference to the discriminatory and oppressive Israeli legal and political regime that pre-dates the 1967 occupation. These frameworks, therefore, transcend and help overcome the separation between “Israel and the OPT” and the fragmentation of the Palestinian people which have resulted from the dominant IHL paradigm. For example, the policies of closure and blockade employed by the Israel against Palestinians in the occupied Gaza Strip are best characterized as inhumane act under Article 2c of the Apartheid Convention (preventing a racial group from participation in the political, social, economic and cultural life of the country ...), and the same Article also applies to all Palestinian refugees who are denied the right to return.

Colonialism and apartheid are defined as racist regimes which are always absolutely prohibited in their entirety. Under IHL in comparison, occupation per se is lawful, and an occupation regime may remain lawful even if certain policies and practices of the occupying power are illegal or constitute war crimes.

Colonialism and apartheid result in legal responsibility for states, in addition to their obligations under the Fourth Geneva Convention and other treaties. All states have the duties not to recognize nor render aid or assistance to colonialism and apartheid, and to cooperate to end these violations. Moreover, apartheid and forced population transfer are also criminalized and entail individual legal responsibility.

Colonialism, apartheid and ethnic cleansing resonate negatively worldwide and can serve to mobilize public opinion and political support. The language of colonialism resonates in particular with formerly colonized nations in Africa, Latin America and elsewhere. It can be used, for example, with the African Union whose political backing is needed in the UN General Assembly for an ICJ advisory opinion, and for bringing a case to the ICC. The African Union is likely to offer support due to the perceived bias of the ICC against Africans.

In the discussion, several participants, including the participants from Gaza, asserted that IHL should not be abandoned. Others, in particular members of the Palestinian academia, did not see the merits of applying apartheid and colonialism to the Palestinian situation, arguing that “all existing international applies to Palestinians”. In response, it was argued that international law is not static, but is undergoing a continuous process of interpretation and transformation. International law is, thus, a tool for advancing Palestinian rights and interests to the extent Palestinians and their supporters partake in the on-going process of interpretation and development of the law. One scholar alerted of the fact that Israel, in particular, is engaged in constant contestations over definitions and classifications of IHL to further its own agenda, and that its interpretations have got much more traction in the context of the “war on terror” paradigm promoted by the U.S. Some examples of Israeli “successes” are the re-interpretation of attacks by non-state actors as ‘armed attacks’, the right of a state (even an occupying power)


to invoke self-defense under the UN Charter against non-state actors, the concept of pre-emptive self-defense and the creation of a new category of ‘illegal combatants’. Israel has justified the use of violent externalized modes of control against the occupied Palestinian population on this basis, in particular against Gaza since 2008, and has found (partial) support even among serious human rights organizations and the ICRC.

Several participants, including legal advisers of the PA Ministry of Foreign Affairs and politicians, were unfamiliar with apartheid as defined in international law and/or reluctant to abandon the language of IHL they are accustomed to. This was illustrated, for example, by statements claiming that the apartheid framework would undermine the right to self-determination, or that adoption of a colonialist understanding of the context would lead to the conclusion that the whole of historic Palestine is “occupied”. Finally, criticism was raised by many of Palestinian politicians, including Abu Mazen, for using “apartheid” in their political speech, while disregarding the consequences that flow from its legal meaning.

**Points of agreement/legal frameworks:**

- Most participants agreed that apartheid and colonialism are frameworks that should guide Palestinian strategies which seek to overcome the limitations of the IHL paradigm currently in use.
- Participants also agreed that IHL should not be discarded, that efforts to ensure respect of IHL in the OPT should continue, and that Israeli efforts to reinterpret IHL to suit its interests must be challenged.
- Many participants raised the need to foster awareness about the legal meaning and consequences of apartheid and colonialism under international law among relevant sectors of Palestinian society.

### 1.2 Toward a Palestinian strategy based on the legal frameworks of colonialism, apartheid and IHL

One participant suggested that such a strategy should have self-determination as the overarching goal, and should: i) outlaw the occupation; ii) include the entire Palestinian people (those in the OPT, citizens of Israel and the external refugees); and iii) empower people. It was noted that the BDS movement has already adopted this approach, and that this approach has consensus among Palestinians. Staff of a Palestinian human rights organization questioned whether we actually know what is the Palestinian consensus.

A major part of the discussion revolved around the obstacles faced in advancing a strategy against Israeli colonialism and apartheid. Among the obstacles addressed was the resistance of the international community, including UN bodies, against the apartheid framework, because of the political pressure exerted by Israel, the United States and affiliated lobby-groups. One example presented was the recent UN Fact Finding Mission on the Israeli settlements which clearly identified elements of the crime but avoided explicit mention of “apartheid” in its report. Asked by Palestinian human rights organizations to explain why, members of the Mission said that explicit reference to apartheid “isn’t helpful.”

Participants, however, were primarily concerned about the lack of political will among the Palestinian leadership and the division between the authorities in Gaza and the West Bank. There was agreement that the strategy should be designed in a manner that will allow
implementation by civil society irrespective of the position of the leadership. At the same time, participants concurred that support of the leadership will be required at some point for any strategy to be effective, and that cooperation with the leadership must be sought. In this regard, it was emphasized that an anti-apartheid strategy does not necessarily contradict leadership objectives and interests, and that prospects of cooperation may be enhanced if the strategy is designed in a manner that makes it useful also for PA/PLO diplomacy.

In this vein, it was pointed out that the Palestinian anti-colonial and anti-apartheid strategy must build on the past achievements of the PLO, and take into account the gains and risks resulting from the current statehood drive. One participant listed the main achievements of the PLO:

1 – WB and Gaza are defined as “occupied territory”
2 – PLO is recognized as the legitimate representative of all Palestinians
3 – State of Palestine exists as a matter of law
4 – ICJ ready, willing and able to seize itself on the matter of Palestine
5 – There is a possibility of accession to the Rome Statute/ICC

With regard to the current statehood drive, another participant commented that the fact that this was an independent Palestinian initiative, which was pursued despite US and Israeli opposition, should be noted positively, in addition to the access to the ICC. At the same time, the statehood drive entails serious risks:

1 – It may contribute to a process of downsizing of Palestine, possible even reducing its area to the West Bank and excluding Gaza
2 – It may reduce the Palestinian people to those residing in the West Bank
3 – It may result in the eclipse of the PLO by the PA, the latter becoming the actual “state”.

Points of agreement/strategy

- Many of the participants agreed that development of an anti-colonial, anti-apartheid strategy should proceed.
- Future discussion about the appropriate strategy should be guided by the parameters identified in the roundtable, and it should examine in-depth a number of relevant proposals presented by guest speakers in the conference.

1.3 Utilizing international legal mechanisms: lessons learned, steps to be taken

Participants discussed if and how international legal mechanisms, including the ICJ and ICC, could be used as part of a Palestinian anti-colonial and anti-apartheid strategy.

A second ICJ advisory opinion on Israeli colonialism and apartheid – some practical lessons learned from work for the 2004 ICJ opinion on the Wall, as well as additional issues to be considered in preparations for a second ICJ opinion, were summarized by guest speakers:

- The first ICJ opinion was only possible because the PLO was fully supportive and mobilized. The PLO mission at the UN in New York effectively lobbied member states to accept the GA resolution to recommend the case of the Wall to the ICJ.
- At the same time, civil society undertook intensive awareness-raising and advocacy about the Wall which complemented the PLO initiative.
• When compiling the file, a decision was taken to rely only on UN sources, in order to strengthen the credibility of the case.

• A shortcoming of the 2004 opinion is its lack of practical and detailed recommendations to third states on what they should do in order to implement their own legal obligations. The ICJ affirmed third state obligations in a very general manner, and this has been an obstacle to more effective use of the opinion.

• The current composition of the ICJ is less favorable than in 2004, as judges are less familiar with the context in Palestine. This composition of the court will change in a couple of years and must be monitored.

• Strategic planning for a second ICJ opinion must include a plan for how the opinion will be used, and a contingency plan for how to handle an opinion that does not meet expectations.

Participants differed in their assessment of the value of ICJ advisory opinions. On the one hand, many human rights advocates have argued that the Wall Opinion of 2004 is a milestone that has facilitated substantially the success of civil society advocacy and the BDS campaign, and that the ICJ is the primary international mechanism for achieving an authoritative legal opinion affirming that Israel’s occupation regime amounts to colonialism and apartheid and is, therefore, unlawful and criminal in its entirety. On the other hand, several participants in the roundtable, including members of political groups, expressed doubt about the ICJ course of action, arguing that the 2004 opinion has been of little use due to lack of enforcement.

Participants were also divided over which of the two proposed questions to the ICJ would be most appropriate. Some favored the question proposed by John Dugard ("What are the legal consequences of a regime of prolonged occupation, with features of colonialism and apartheid resulting from the establishment of Jewish settlements, in the Occupied Palestinian Territory, including East Jerusalem, for the occupied people, the occupying Power (Israel) and third states?"), mainly because the case could be argued based on hard international law and the extensive UN record pertaining to the OPT. Others feared that exclusive focus on the OPT might lead to more fragmentation of Palestine, the country, and its people, in international law and favored, therefore, the question proposed by George Bisharat ("Does Israel’s treatment of the Palestinian people as a whole - citizens of Israel, residents of the Occupied Palestinian Territories, and external refugees – breach the prohibition of apartheid under international law?"). Participants agreed that the merits and risks of either require further discussion.

The ICC option – Israeli settlements as an international crime – Once more, some important facts and issues to be considered were summarized by guest speakers:

• Unlike the ICJ option, the ICC option is available immediately, either upon ratification of the Rome Statute by Palestine, or based on the 2009 open-ended declaration of the PLO accepting the jurisdiction of the ICC.

• Only crimes committed after the declaration/accession to the Rome Statute will be considered; for this reason, a case should be brought against the Israeli settlements as an international crime.

• The lack of territorial jurisdiction does not prevent Palestine’s accession to the Rome Statute because independent ratification of the Statute has been accepted from other entities of similar status, such as the Cook Islands, a dependency of New Zealand.
The mere opening of an ICC investigation, even if prosecution is not forthcoming, would be an important step towards the international isolation of Israel.

Other mechanisms proposed by participants - The inter-state complaint mechanism under the Covenant for the Elimination of Racial Discrimination (CERD) was suggested by a human rights lawyer as a means for the PLO/Palestine to obtain a legal finding on Israeli apartheid from independent experts. The CERD complaint mechanism could be used immediately, (if/as soon as Palestine has ratified the Covenant), as part of the preparation for an ICJ advisory opinion, or as a (temporary) substitute, if the idea of the ICJ has to be dropped or postponed.

Another human rights lawyer pointed at ways whereby the PLO/Palestine could move away from the Oslo framework and improve its standing in negotiations with Israel, as well as in the United Nations. It could do so by challenging the idea of Israel as a Jewish state, for example by demanding that Israel implement legislation that guarantees full equality for all its citizens, and by promoting a new GA resolution in this regard.

As participants examined these various mechanisms and options, the lack of political will and support by the Palestinian leadership took once more center-stage. Many participants deplored the abuse of the ICC option as a political threat and bargaining chip, and a recent announcement by Abu Mazen that all “unilateral moves” (meaning the ICC) against Israel would be put on hold in order to give negotiations a chance. Others, including NSU legal advisers, encouraged participants to look at the leadership in a more nuanced way, saying that there are some who could be supportive and should be approached in order to advance the strategies and options discussed here.

Another suggestion raised by a Palestinian lawyer and former NSU staff was that there should be a discussion within Palestinian society about the ICC and ICJ, in order to ensure that these options are understood and people are aware of the cost they may entail in terms of political isolation and sanctions instigated by Israel.

Points of agreement/international mechanisms

- There was agreement about the need to continue the discussion about the appropriate and effective utilization of the ICJ, ICC and other international mechanisms and tools with both, specialists and the wider Palestinian public.

2. Issues and practical steps suggested for the follow-up process:

a) Awareness-raising and training activities should be undertaken to educate relevant sectors of Palestinian society, in particular civil society activists, university students and politicians, about the meaning and consequences of apartheid, colonialism and forced population transfer in international law, and about possibilities and risks of the ICJ and ICC options. These activities should help people apply and express themselves through the language of these frameworks, avoid and challenge meaningless “political” labeling, and shape an informed public opinion about if/when/how Palestinians should approach the ICC and/or ICJ.
b) A forum should be created for the development of a proposal of an integrated Palestinian anti-colonial, anti-apartheid strategy. Such a forum should involve members of the Palestinian human rights, legal and political community in Palestine and outside (via skype). It should identify the main elements of the strategy and provide answers to the important question of how the Palestinian leadership can be influence and engaged. For this purpose, the forum should:

- Study in-depth a number of relevant proposals presented by guest speakers in the conference. These include in particular the proposal of an “integrated strategy for liberation” (George Bisharat), and the ideas raised by John Reynolds in his paper on "legal resistance: strategies and tactics" for garnering the support of international legal and political fora and public opinion. The forum should also examine the merits of the strategy proposed by Charles Shamas for the “passive enforcement” of third-state obligations at a technical level.
- Identify the technical support, including research, expertise, etc., required for the development of the strategy.

c) A team of experts should be composed to formulate a proposal of the most feasible and effective utilization of the international legal mechanisms discussed in the conference, in particular the ICJ and ICC, in the context of a broader anti-colonial and anti-apartheid strategy. The team’s proposal should include, among others:

- Answers to the unresolved question if and how Palestinian legal initiatives based on positive/hard international law (and, thus, focused on the OPT) can be used tactically in a manner that transcends the fragmentation of the Palestinian people, rights and territory, or whether OPT-focused initiatives necessarily reinforce the existing fragmentation. The team should formulate an opinion on this basis about the questions to the ICJ proposed by John Dugard and George Bisharat, and about a possible case to the ICC on the Israeli settlements as a war crime.
- Recommendations regarding the most effective and feasible next steps for advancing Palestinian initiatives in these mechanisms. In this context, the team should assess possible practical steps suggested in the conference. For example, should a case for the ICJ be prepared already now in anticipation of appropriate timing for submission? Should a concept note for an ICC/ICJ strategy be prepared as a tool for seeking green light from Abu Mazen to proceed? Should the idea of an inter-state complaint to CERD be pursued?
Human Rights Council
Twenty-ninth session
Agenda item 7
Human rights situation in Palestine and other occupied Arab territories

Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1

Summary

The present report contains the main findings and recommendations of the commission of inquiry established pursuant to Human Rights Council resolution S-21/1. In the report, the commission urges all actors to take immediate steps to ensure accountability, including by guaranteeing the rights of all victims to an effective remedy.

* Late submission.
** For detailed findings of the commission of inquiry, see document A/HRC/29/CRP.4.
*** The annexes to the present report are circulated as received.
threat to the security forces. United Nations data indicate that the number of those killed within this period was equivalent to the total number of Palestinian fatalities in similar circumstances throughout 2013 (ibid.). These data further show that the large number of deaths and injuries was a direct result of the regular recourse to live ammunition by the Israeli security forces and the apparent rising trend in the use of 0.22 inch calibre bullets in crowd-control situations. The increased use of live ammunition, combined with the spike in casualties, appears to reflect a change in policy guiding the law enforcement operations of the Israel Defense Forces in the West Bank.

The commission is particularly concerned that the pervasive use of live ammunition inevitably raises the risk of death or serious injury. The use of firearms against those not posing a threat to life or serious injury constitutes a violation of the prohibition of the arbitrary deprivation of life, and may, depending on the circumstances, amount to an act of wilful killing. The unjustified recourse to firearms by law enforcement officials may be considered a war crime when it takes place in the context of an international armed conflict, including a situation of military occupation, and that the person killed was a protected person.

VI. Accountability

72. The commission notes the steps taken by Israel to investigate alleged violations of the law of armed conflict by the Israel Defense Forces during operation “Protective Edge” and towards bringing its system of investigations into compliance with international standards. Flaws remain, however, with respect to the State’s adherence to international standards. Further significant changes are required to ensure that Israel adequately fulfils its duty to investigate, prosecute and hold perpetrators accountable for violations of international humanitarian law and international human rights law. One of the measures needed is to enhance the independence and impartiality of the Military Advocate General and to ensure the robust application of international humanitarian law in his decisions regarding criminal investigations. For example, the definition of “military objectives” has implications for both for the Military Advocate General’s operational guidance of troops on the ground and his subsequent assessment of whether to refer a case for criminal investigation. Moreover, the investigations process followed by the Israel Defense Forces focuses on possible individual criminal responsibility at the level of the soldier on the battlefield. Even where the behaviour of soldiers and low-ranking officers during hostilities has come into question, however, this has rarely resulted in criminal investigations. At the policy level, the commission looks forward to reading the report of the State Comptroller’s inquiry into the procedure of decision-making by the military and political echelons during operation “Protective Edge”. The Comptroller’s inquiry should be supplemented by mechanisms – including criminal proceedings and disciplinary measures – that aim to hold to account individuals who may have played a role in wrongdoing. In addition, Palestinian victims face significant obstacles that impede their right to benefit from effective remedies, including reparations.

73. The commission concludes that investigations by Palestinian authorities are woefully inadequate, despite allegations of violations of international humanitarian law by

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63 OCHA, Monthly Report, June – August 2014 (see footnote 59).
64 B’Tselem, “Military steps up use of 0.22 inch bullets against Palestinian stone-throwers”, 18 January 2015.
65 International Covenant on Civil and Political Rights, art. 6.
67 See Fourth Geneva Convention, art. 146.
Palestinian actors, leaving Israeli victims without an effective remedy. With respect to the local authorities in Gaza, no steps appear to have been taken to ensure effective investigations into actions by Palestinian armed groups, seemingly owing to a lack of political will. The Palestinian Authority claims that its failure to open investigations results from insufficient means to carry out investigations in a territory over which it has yet to re-establish unified control.

VII. Conclusions and recommendations

A. Concluding observations

74. The commission was deeply moved by the immense suffering of Palestinian and Israeli victims, who have been subjected to repeated rounds of violence. The victims expressed their continued hope that their leaders and the international community would act more resolutely to address the root causes of the conflict so as to restore human rights, dignity, justice and security to all residents of the Occupied Palestinian Territory and Israel. In relation to this latest round of violence, which resulted in an unprecedented number of casualties, the commission was able to gather substantial information pointing to serious violations of international humanitarian law and international human rights law by Israel and by Palestinian armed groups. In some cases, these violations may amount to war crimes. The commission urges all those concerned to take immediate steps to ensure accountability, including the right to an effective remedy for victims.

75. With regard to Israel, the commission examined carefully the circumstances of each case, including the account given by the State, where available. Israel has, however, released insufficient information regarding the specific military objectives of its attacks. The commission recognizes the dilemma that Israel faces in releasing information that would disclose in detail the targets of military strikes, given that such information may be classified and jeopardize intelligence sources. Be that as it may, security considerations do not relieve the authorities of their obligations under international law. The onus remains on Israel to provide sufficient details on its targeting decisions to allow an independent assessment of the legality of the attacks conducted by the Israel Defense Forces and to assist victims in their quest for the truth.

76. The commission is concerned that impunity prevails across the board for violations of international humanitarian law and international human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture and ill-treatment in the West Bank. Israel must break with its recent lamentable track record in holding wrongdoers accountable, not only as a means to secure justice for victims but also to ensure the necessary guarantees for non-repetition.

77. Questions arise regarding the role of senior officials who set military policy in several areas examined by the commission, such as in the attacks of the Israel Defense Forces on residential buildings, the use of artillery and other explosive weapons with wide-area effects in densely populated areas, the destruction of entire neighbourhoods in Gaza, and the regular resort to live ammunition by the Israel Defense Forces, notably in crowd-control situations, in the West Bank. In many cases, individual soldiers may have been following agreed military policy, but it may be that the policy itself violates the laws of war.
78. The commission’s investigations also raise the issue of why the Israeli authorities failed to revise their policies in Gaza and the West Bank during the period under review by the commission. Indeed, the fact that the political and military leadership did not change its course of action, despite considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes. Current accountability mechanisms may not be adequate to address this issue.

79. With regard to Palestinian armed groups, the commission has serious concerns with regard to the inherently indiscriminate nature of most of the projectiles directed towards Israel by these groups and to the targeting of civilians, which violate international humanitarian law and may amount to a war crime. The increased level of fear among Israeli civilians resulting from the use of tunnels was palpable. The commission also condemns the extrajudicial executions of alleged “collaborators”, which amount to a war crime.

80. The Palestinian authorities have consistently failed to ensure that perpetrators of violations of international humanitarian law and international human rights law are brought to justice. The commission is concerned that continuing political divisions contribute significantly to the obstruction of justice for victims of violations by Palestinian armed groups. The absence of measures to initiate criminal proceedings against alleged perpetrators calls into question the stated determination of the Palestinian Authority to achieve accountability. In accordance with their legal obligations, the authorities must take urgent measures to rectify this long-standing impunity.

81. Comprehensive and effective accountability mechanisms for violations allegedly committed by Israel or Palestinian actors will be a key deciding factor of whether Palestinians and Israelis are to be spared yet another round of hostilities and spikes in violations of international law in the future.

B. Recommendations

82. The persistent lack of implementation of recommendations – made by previous commissions of inquiry, fact-finding missions, United Nations treaty bodies, special procedures and other United Nations bodies, in particular the Secretary-General and OHCHR – lies at the heart of the systematic recurrence of violations in Israel and the Occupied Palestinian Territory. Bearing in mind this wealth of guidance, the commission will not elaborate an exhaustive list of recommendations, which would repeat concerns registered by other bodies. Rather, it calls upon all duty bearers to implement fully all recommendations made by the above-mentioned bodies without delay in order to avert a crisis similar to that of summer 2014 in the future.

83. The commission calls upon all parties to fully respect international humanitarian law and international human rights law, including the main principles of distinction, proportionality and precaution, and to establish promptly credible, effective, transparent and independent accountability mechanisms. The right of all victims to an effective remedy, including full reparations, must be ensured without further delay. In this context, the parties should cooperate fully with the preliminary examination of the International Criminal Court and with any subsequent investigation that may be opened.

84. The commission also calls upon Israelis and Palestinians to demonstrate political leadership by both refraining from and taking active steps to prevent
statements that dehumanize the other side, incite hatred, and only serve to perpetuate a culture of violence.

85. The commission calls upon the Government of Israel to conduct a thorough, transparent, objective and credible review of policies governing military operations and of law enforcement activities in the context of the occupation, as defined by political and military decision-makers, to ensure compliance with international humanitarian law and human rights law, specifically with regard to:

(a) The use of explosive weapons with wide-area effects in densely populated areas, including in the vicinity of specifically protected objects;
(b) The definition of military objectives;
(c) The tactics of targeting residential buildings;
(d) The effectiveness of precautionary measures;
(e) The protection of civilians in the context of the application of the Hanibal directive;
(f) Ensuring that the principle of distinction is respected when active neighbourhoods are declared “sterile combat zones”;
(g) The use of live ammunition in crowd-control situations.

The review should also examine mechanisms for continuous review of respect for international humanitarian law and human rights law during military operations and in the course of law enforcement activities in the context of the occupation.

86. The commission further calls upon the Government of Israel:

(a) To ensure that investigations comply with international human rights standards and that allegations of international crimes, where substantiated, are met with indictments, prosecutions and convictions, with sentences commensurate to the crime, and to take all measures necessary to ensure that such investigations will not be confined to individual soldiers alone, but will also encompass members of the political and military establishment, including at the senior level, where appropriate;

(b) To implement all the recommendations contained in the second report of the Turkel Commission, in particular recommendation No. 2 calling for the enactment of provisions that impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, in line with the doctrine of command responsibility;

(c) To grant access to Israel and the Occupied Palestinian Territory for, and cooperate with, international human rights bodies and non-governmental organizations concerned with investigating alleged violations of international law by all duty bearers and any mechanisms established by the Human Rights Council to follow up on the present report;

(d) To address structural issues that fuel the conflict and have a negative impact on a wide range of human rights, including the right to self-determination; in particular, to lift, immediately and unconditionally, the blockade on Gaza; to cease all settlement-related activity, including the transfer of Israel’s own population to the occupied territory; and to implement the advisory opinion rendered on 9 July 2004 by the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory;

(e) To accede to the Rome Statute.
87. The commission calls upon the State of Palestine:

(a) To ensure that investigations into violations of international humanitarian law and international human rights law, including international crimes, by the Palestinian Authority, the authorities in Gaza and Palestinian armed groups, where substantiated, comply with international human rights standards and that full accountability is achieved, including through criminal proceedings;

(b) To accelerate efforts to translate the declarations on Palestinian unity into tangible measures on grounds that would enable the Government of national consensus to ensure the protection of human rights and to achieve accountability for victims.

88. The commission calls upon the authorities in Gaza and Palestinian armed groups:

(a) To respect the principles of distinction, proportionality and precaution, including by ending all attacks on Israeli civilians and civilian objects, and stopping all rocket attacks and other actions that may spread terror among the civilian population in Israel;

(b) To take measures to prevent extrajudicial executions and eradicate torture, cruel, inhuman and degrading treatment; to cooperate with national investigations aimed to bring those responsible for violations of international law to justice; and to combat the stigma faced by families of alleged collaborators.

89. The commission calls upon the international community:

(a) To promote compliance with human rights obligations, and to respect, and to ensure respect for, international humanitarian law in the Occupied Palestinian Territory and Israel, in accordance with article 1 common to the Geneva Conventions;

(b) To use its influence to prevent and end violations, and to refrain from encouraging violations by other parties;

(c) To accelerate and intensify efforts to develop legal and policy standards that would limit the use of explosive weapons with wide-area effects in populated areas with a view to strengthening the protection of civilians during hostilities;

(d) To support actively the work of the International Criminal Court in relation to the Occupied Palestinian Territory; to exercise universal jurisdiction to try international crimes in national courts; and to comply with extradition requests pertaining to suspects of such crimes to countries where they would face a fair trial.

90. The commission recommends that the Human Rights Council consider conducting a comprehensive review of the implementation of the numerous recommendations addressed to the parties by its own mechanisms, in particular relevant commissions of inquiry and fact-finding missions, and explore mechanisms to ensure their implementation.
The State Comptroller and Ombudsman Inquiry - Operation Protective Edge

Judge Joseph H Shapira is currently conducting an inquiry regarding procedures of decision-making by the military and political echelons during operation Protective Edge.

As previously published and as noted by the Human Rights Council's commission of inquiry, the State Comptroller and Ombudsman of Israel the Hon. Judge Joseph H Shapira is currently conducting an inquiry regarding procedures of decision-making by the military and political echelons during operation Protective Edge. The inquiry includes as well varied aspects of international law. Contrary to some assertions, the inquiry focuses on the compliance with the tenets of established international law. Among other issues, it also focuses on the application of the investigational measures established by the international law, to acts been performed by the IDF and the government during the operation. The inquiry is based on decisions of the Supreme Court, previous reports of the State Comptroller, and recommendations of Commissions of Inquiry such as the "Turkel Commission", that has examined Israel's mechanisms of investigating complaints and claims regarding violations of Humanitarian Law.
The field work is in progress and the analysts' team has collected materials concerning events that occurred during the operation and concerning the mechanisms of investigation been applied. The Final Report of the State Comptroller will be based on the specific evidence collected as shaped by insights drawn from the underlying values of both international and Israeli law. The analysis of the material is currently being processed with the assistance of external experts, as previously published.

The State Comptroller - who operates fully independently in accordance with his constitutional authority - intends to review, among other aspects, different issues being discussed in the report of the Human Rights Council's Commission of Inquiry. The independent and impartial assessment of the State Comptroller and Ombudsman cannot be constrained by artificially imposed deadlines or external expectations. Efforts will be made to complete a draft of the report in the coming months.
The Ciechanover Report – dodging the criminalization of war crimes and practical steps toward implementation

An analysis of the report of the Ciechanover Commission, a team appointed to review and implement the recommendations made by the Turkel Commission on Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law.

The Ciechanover Commission was established for the purpose of recommending practical steps towards implementing the recommendations of the Turkel Commission for improving Israel’s mechanisms for investigating alleged violations of the laws of war.

The report published by the Ciechanover Commission completely fails to fulfil its purpose, and most of the recommendations it contains remain general rather than practical and functional. The Ciechanover Commission avoided making concrete practicable recommendations related to the human resources and budgeting requirements needed to effectuate the Turkel recommendations, and some of its recommendations lack timetables and stages for implementation. Without tackling these practical aspects, the various agencies involved will not be able to carry through the recommendations, sentencing them to remain a dead letter for some time to come.

The Ciechanover Commission eschewed the recommendations made by the Turkel Commission on one central aspect, namely the need to bring the legal situation in Israel on par with the standards of international law on the criminalization of war crimes and the responsibility of commanders and civilian superiors. In this context, the Ciechanover Commission confined itself to advising that the Attorney General promote legislative measures focusing on torture and crimes against humanity, and blatantly refrained from advocating the adoption of domestic legislation defining the offenses of war crimes in a manner that conforms with international law.

Background:

Following the May 2010 flotilla incident (the Mavi Marmara), former High Court Justice Jacob Turkel was appointed to chair a public commission that would look into the flotilla incident itself, as well as Israel’s mechanisms for examining and investigating allegations and claims of violations of the laws of armed
conflict according to international law. The Turkel Commission submitted its report to Prime Minister Netanyahu in February 2013. The commission found that: “[T]here are grounds for amending the examination and investigation mechanisms and [...] in several areas there are grounds for changing the accepted policy”. It also found that, “certain accepted practices – that are appropriate in themselves – should be enshrined in express written guidelines that are made publicly available”. The Turkel Commission compiled these desirable changes into 18 recommendations directed at various agencies: the IDF, the Israel Police, the Israel Prison Service, the Israel Security Agency and the Ministry of Justice.

Recommendation No. 18 in the Turkel Report focused on the implementation of the remaining recommendations, stating that: “The Commission recommends that the Prime Minister should appoint an independent implementation team that will monitor the implementation of the recommendations in this Report and report periodically to the Prime Minister”.

It was not before January 2014, a year after the publication of the Turkel report, that the Government of Israel decided to put together a team to review and implement its recommendations. Dr. Joseph Ciechanover was chosen to chair this new commission. Its remaining members were Brig. Gen. Herzl Halevi, Brig. Gen. (reserves) Rachel Dolev, Dr. Roy Schondorf and Mr. Raz Nizri. The Ciechanover Commission took twenty months to complete its task and publish its recommendations regarding the implementation of the Turkel recommendations. Its report, listing these recommendations, was submitted to Prime Minister Binyamin Netanyahu in August 2015 and released to the public at the end of September 2015.

Avoiding legislation that incorporates war crimes

The Ciechanover report overtly avoids issuing instructions for the full implementation of the first two recommendations made by the Turkel Commission with respect to legislation that incorporates norms and standards of international law into Israeli law. On the issue of incorporating war crimes into Israeli domestic law (Turkel Recommendation No. 1), the Ciechanover Commission chose to advise the preparation of draft bills on the incorporation of the crime of torture and crimes against humanity into Israeli law, when such crimes are committed as part of a systematic or widespread policy. The fact that in addressing legislative measures, the Ciechanover Commission glossed over offenses that are commonly committed in the West Bank and may amount to war crimes, yet are not committed in the context of systemic use of force, such as beating restrained

3 On January 5, 2014, the 33rd Government of Israel passed Resolution No. 1143 regarding “The appointment of a team to review and implement the Second Report of the Public Commission to Examine the Maritime Incident of May 31st 2010 (regarding the examination and investigation in Israel of complaints and claims of violations of the Law of Armed Conflict under international law”.
detainees and other violent offenses, is a cause for concern. The Commission also ignored offenses committed during times of war, leaving the current lacuna in Israeli law unchanged. While Israeli criminal law contains offenses that may be used against soldiers who beat civilians in checkpoints or harm property (though, these soldiers cannot be charged with war crimes) when it comes to offenses committed during combat, criminal law offers no parallel offenses that allow laying charges.⁵

The Ciechanover Commission entirely circumvented the implementation of Recommendation No. 2 of the Turkel report with respect to imposing special responsibility on military commanders and civilian superiors for offenses committed by their subordinates. The Ciechanover Commission opted instead to recommend that: “[T]he question of the explicit anchoring of the responsibility of military commanders and civilian superiors in Israeli law would continue to be examined by the relevant parties before being decided”.⁶ This means that the current situation, whereby there are no criminal tools for imposing liability on commanders and superiors for the actions of subordinates will remain as it is.

Refraining from incorporating war crimes and liability of commanders and superiors into Israeli law has grave implications for Israel’s claim that the principle of complementarity is fulfilled, thus shielding it from prosecution in international tribunals.

The recommendations lack concrete, practical directives

As stated, the purpose of the Ciechanover Commission was to monitor the implementation of the Turkel recommendations in consultation with the relevant professional officials and agencies, with a focus on the practical, functional side. Instead, the recommendations contained in the Ciechanover report are broad, general and do not address the practicalities of implementing the Turkel recommendations. Implementing recommendations on the scale of those made in the Turkel report requires resource allocation – budgets, staffing, human resources, timetables and operative steps toward implementation on the ground. The Ciechanover report lacks such practical details, and its recommendations address implementation at a general level only, similarly to the Turkel recommendations. The lack of reference to the practical aspects involved in implementing the Turkel recommendations raises concern that the various agencies involved will not be able to carry them through.

So, for instance, with respect to Recommendation No. 9 of the Turkel report, relating to the establishment of an operational matters unit within the Military Police Criminal Investigations Division, the Ciechanover Commission did not find it necessary to determine, in consultation with the relevant professionals, what the staffing requirements for such a new unit would be or what training staff would need, nor did it find it necessary to assess the budgetary implications of establishing and running such a unit. The Ciechanover Commission merely repeated the Turkel recommendation to establish a new unit, without addressing the human and financial resources this would require.

The same holds true for Recommendation No. 10 of the Turkel Commission, which concerns establishing a timeframe for criminal investigations. While the Chief Military Prosecutor is preparing draft guidelines that would cap investigations at nine months, the Ciechanover Commission report does not address the

⁵ See, Lacuna: War Crimes in Israeli Law and Court Martial Rulings, Yesh Din, July 2013.
critical question of whether this new timeframe can, in fact, be met with the number of Arabic speaking investigators currently serving in the Military Police Criminal Investigations Division, or whether more staff should be recruited and more investigators should be trained. The Commission also failed to address the length of time required to train investigators and the budgetary implications of these measures. Effective investigations within reasonable timeframe clearly require enough staff who are able to handle the workload. Investigations, which are currently inordinately protracted, sometimes taking years, cannot reasonably be expected to become more expeditious without the allocation of suitable resources.

The lengthy duration of each stage of the investigation process (the process leading up to the decision whether to open an investigation, the investigation itself and the process leading up to the decision whether to prosecute after the investigation is concluded) plays a major role in the closure of many investigation files, and in effect, obviates the possibility of prosecuting offenders, including those who have committed war crimes. Setting timeframes without making the changes that would allow them to be met may perpetuate the current lamentable state of affairs and severely undermine the ability to conduct timely, effective investigations.7

Conclusion

Twenty months after the establishment of the Ciechanover Commission (January 2014), and five years and four months after the establishment of the Turkel Commission, with the wars and military operations such as Pillar of Defense and Protective Edge that took place in the interim, there are still no prospects for improvement in Israel’s investigation and examination mechanism or for legislative measures that would bring Israel in line with its obligations under international law.

The long wait for the publication of the Ciechanover Commission report and the recommendations it finally made suggest that instead of effecting the changes in the investigation mechanism recommended by the Turkel Commission, the Ciechanover Commission set out to buy time, create the false impression that the investigation and examination mechanism is undergoing improvements and continue to grant impunity to members of the security forces and civilian superiors who violate the laws of war under international law.

7 See for instance, the outrageously slow proceedings in every stage of the investigation into the death of Bassem Abu Rahmeh: beginning with the decision to open an investigation, the investigation itself, the decision at the conclusion of the investigation and the decision in the appeal filed against its closure, http://www.yesh-din.org/infoitem.asp?infocatid=706.
PROSECUTION OF ISRAELI CIVILIANS SUSPECTED OF HARMING PALESTINIANS IN THE WEST BANK

Yesh Din monitoring figures

- A fraction (7.4 percent) of complaints filed by Palestinians with the Israel Police result in a decision to indict Israeli civilians suspected of harming them
- In the few cases in which law enforcement agencies do decide to indict suspects, only a third of legal proceedings (33.3 percent) result in full or partial convictions
- Almost a quarter of the legal proceedings (22.8 percent) are ultimately cancelled or vacated, and approximately another quarter (24.6 percent) result in a judicial decision not to convict the defendants, despite finding that they did commit the alleged offenses for which they were tried

BACKGROUND

For the past ten years, Yesh Din has been documenting ideologically motivated crime perpetrated by Israeli citizens against Palestinians and their property throughout the West Bank. This type of crime is unique in that it has a clear strategic objective – it is meant to terrorize Palestinian victims in order to drive them off their lands, and take over these lands to expand the area under the control of illegal outposts and settlements in the West Bank.¹

In addition to documenting the criminal offenses, Yesh Din closely follows police investigations opened into such incidents and monitors the Samaria and Judea (SJ) District Police’s success in investigating them and prosecuting the offenders.

This ongoing monitoring of investigations and their outcomes is at the core of a long-term project implemented by Yesh Din with the goal of strengthening law enforcement on Israeli civilians (settlers and others) involved in harming Palestinians and their property. The project is based on the principle that Israel is legally and morally obligated to protect the Palestinian residents of the occupied territories under its control.

Yesh Din’s database of cases monitored has grown over the years. In early 2015, it included over a thousand investigation files opened by various units within the SJ District Police since 2005, following complaints filed by Palestinian victims of crimes perpetrated by Israeli citizens. The incidents under investigation involve assault, use of firearms, stone-throwing, vandalism, theft or arson of property, damaging olive trees and other crops, killing and harming livestock, desecrating holy places, trespassing, preventing access to Palestinian owned farmland or cultivating land owned by Palestinians, and many other offenses expressly intended to harm Palestinian residents of the West Bank or their property.

Yesh Din has published annual figures on the results of these investigations, aiming to shed light on how many investigations lead to indictments served against suspected offenders and how many end without substantive results. Year after year, the figures have reflected that the SJ District Police has not demonstrated any improvement in its ability to solve cases of ideologically motivated crime against Palestinians in the West Bank and hold perpetrators

¹ In our 2013 report The Road to Dispossession, the outpost of Adei-Ad served as a test case to demonstrate the clear connection between the time and place of criminal offenses and the outpost’s rate of expansion (Yesh Din, The Road to Dispossession - A Case Study: The Outpost of Adei-Ad, 2013, p. 124).
accountable. The rate of solved cases has stayed extremely low, and the number of indictments served against Israeli citizens suspected of committing offenses against Palestinians annually is negligible.

According to Yesh Din’s most recent datasheet,3 of 1,045 investigation files opened by the SJ District Police between 2005 and 2014,4 only 72 indictments were served (7.4 percent of all concluded investigations). The vast majority of the cases (91.4 percent of all concluded investigations) were closed without any suspect prosecuted.4

These figures are consistent with earlier findings by Yesh Din. In 2013, the indictment rate was 8.5 percent,5 and 8.6 percent in the previous year.6 This steady trend reflects the low likelihood that a complaint made by a Palestinian to the Israel Police will result in the apprehension and prosecution of the perpetrators. With such dire prospects, there is little wonder that many Palestinians feel that filing complaints with the Israel Police is pointless.

But this is not the only obstacle Palestinians encounter when demanding their right to justice and equality before the law. Monitoring of the results of proceedings in the few cases that do result in a decision to indict Israeli citizens suspected of harming Palestinians demonstrates that the state of affairs at this particular juncture of law enforcement is also far from satisfactory.

Over the past few years, Yesh Din has monitored proceedings in various courts following the few indictments served in cases of ideological crime against Palestinians, in order to learn more about this final link in the long chain of law enforcement in the West Bank. This datasheet is a first attempt to present a comprehensive account of the results of legal proceedings held in investigation files monitored by Yesh Din from 2005 until the end of 2014.7

**FIGURES**

Since Yesh Din began monitoring SJ District Police investigations into Palestinians’ complaints in 2005, 1,067 files have been added to our database. Police investigations are often a lengthy affair, and some of the complaints monitored by Yesh Din are still under investigation or in other stages of processing. At the time of writing, 71 of the files monitored by Yesh Din are still being processed by various law enforcement officials and no final decision has been made in them.

The remaining 996 cases have either concluded, or a decision has been made in them, allowing for follow-up on the results achieved by the SJ District Police

- **911** files (91.5 percent of all concluded investigations) were closed without an indictment being served against suspects;
- **11** files (1.1 percent of all concluded investigations) were lost by the Israel Police and never investigated – despite the fact that Yesh Din has written confirmation that a complaint was filed;
- In **74** files (7.4 percent of the investigations concluded to date), indictments were served against suspects.

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2 [Law Enforcement on Israeli Civilians in the West Bank](https://www.yesh-din.org/law-enforcement-on-2014) (Yesh Din, November 2014).
3 This datasheet refers to cases opened by the SJ District Police until August 2014.
4 The remaining 11 files were lost by the Israel Police and never investigated, though Yesh Din has confirmation that a complaint was filed.
7 It is important to note that this datasheet does not purport to include **all indictments served against Israelis suspected of harming Palestinians**, but a summary of the results in legal proceedings conducted in cases monitored by Yesh Din. Repeated inquiries with the police regarding the number of indictments served annually in cases of offenses by Israelis against Palestinians or their property have not yielded significant results. As such, files in which Yesh Din represents Palestinian crime victims are taken as a broad, representative sample of ideological crime. If anything, circumstances in the cases included in this sample favor law enforcement agencies as when necessary, Yesh Din helps investigation and prosecution officials contact the victims, obtain documents and assist witnesses to arrive at court.
For purposes of this report, six cases in which the crime victims were Israelis or foreign nationals, rather than Palestinians, were omitted from the total number of indictments. Additionally, to avoid duplicity, two cases in which the police filed an indictment as part of another investigation file were omitted from the total number of indictments. Four cases which were closed upon conclusion of the investigation and reopened in response to an appeal by Yesh Din and ultimately resulted in indictments, are included in the total.

In summary, of 1,067 investigation files opened by the SJ District Police between 2005 and 2014 following complaints by Palestinians and monitored by Yesh Din, 70 resulted in indictments and legal action taken against Israeli citizens accused of harming Palestinians. The results of these proceedings are presented in this datasheet.

C

INDICTMENTS

Types of offenses

As stated, the 70 indictments served against Israeli citizens accused of harming Palestinians are a minority among the total number of SJ District Police investigation files monitored by Yesh Din. In total, 120 individuals were charged in these indictments; an average of 1.7 defendants per indictment.

An analysis of the cases shows that the majority of these indictments (61.4 percent) were filed regarding incidents classified by Yesh Din as violent offenses. Indictments were served for beating Palestinian farmers or shepherds on their land; assaulting Palestinians with clubs or metal bars; group assault by masked Israelis; stone-throwing; use of firearms; threatening violence and more. One of these 43 indictments was served following an exceptionally serious incident that took place in July 2007, when two Israeli citizens abducted a 15-year-old boy from the village of Qusra at gunpoint, severely beat him, killed a lamb he had with him and ultimately abandoned him bound, naked, injured and unconscious in a field between Qusra and the illegal outpost of Esh Kodesh.

Yesh Din's cumulative monitoring figures show that approximately half of the ideologically motivated offenses against Palestinians in the West Bank are property offenses. These include setting fire to structures and vehicles, theft of livestock, damage to farmland, damage to fruit trees, crop theft and more. The data indicate that the failure to indict offenders is most prominent with respect to property offenses. Only 20 percent of indictments filed in cases monitored by Yesh Din concerned offenses against property owned by Palestinians. These 14 indictments were served for criminal trespassing on Palestinian-owned land; cutting down, defacing or damaging olive trees; crop theft; arson of cars belonging to Palestinians; theft of livestock belonging to Palestinians; damaging farmland, farming equipment and property. One of these indictments was served following an incident in November 2013, in which a truck and a car belonging to a Palestinian resident of Far’ata were torched and Star of David signs were spray-painted on

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8 Yesh Din cases 1179/06, 1230/06, 1257/07, 1778/09, 1819/09 and 2157/10.
9 Yesh Din case 1235/07 in which an indictment was served together with case 1210/06 and case 1394-7/08, in which an indictment was filed together with case 1394-5/08.
10 Yesh Din cases 1079/05, 1582/08, 1954/09 and 2179/10.
11 In three of the cases, Yesh Din was not informed how many defendants were named in the indictment. Hence, the number may be slightly higher than 120.
12 The complaints in the cases monitored by Yesh Din are divided in the organization’s publications into four major offense categories: violence, property offenses, seizure of Palestinian land and a fourth category covering other types of offenses such as desecration of mosques and cemeteries, discharging sewage into Palestinian farmland, dumping waste on Palestinian land and more.
13 Yesh Din case 1299/07. In this case, an indictment was served against one defendant in December 2008 (CrimC 279/08 State of Israel v. Strock) for aggravated assault, kidnapping for the purpose of causing bodily harm, three counts of assault and one count of harming an animal. He was convicted in November 2011 by the Jerusalem District Court and sentenced to 16 months in prison and payment of 50,000 NIS in damages to the complainant. Strock appealed his conviction to the Supreme Court. The appeal was rejected in August 2012. At the same time, the Supreme Court accepted the State’s appeal against the lenient sentencing decision, and increased the penalty to 30 months in prison. Strock was released from prison in April 2014, 9 months before the end of his sentence, after the parole board granted him early release, despite the State Attorney Office’s objection. The other civilian involved in the attack was never apprehended.
Yesh Din Volunteers for Human Rights

nearby walls. In an unusual verdict, the Court addressed the severity of the arson committed by the three defendants, residents of the illegal outpost of Havat Gilad, and the particular severity of the ideological motivation for their crime. The Court also stressed the "great damage caused by these offenses and the contribution they made to further embittering the relationship between Israelis and Palestinians and feeding the continued cycle of hostilities between the two sides".

One of the better known expressions of ideologically motivated crime in the West Bank is damage to trees belonging to Palestinians. About half of the property offenses documented by Yesh Din in the past decade were cases in which olive and other fruit trees were defaced. Such actions severely damage Palestinians’ property and directly harm their livelihoods.

As part of its monitoring of SJ District Police investigations, Yesh Din has focused special attention to a slew of cases in which fruit trees were cut down, uprooted, set on fire, stolen or damaged. Most of these trees were olive trees, but almond, lemon fig and other trees have come under attack as well. The data shows that although these types of offenses are widespread, very few investigations into them result in a decision to indict offenders. Only six of 251 investigations opened following attacks on trees and monitored by Yesh Din resulted in a decision to indict suspects (2.5 percent of concluded cases). Most of these indictments included additional charges, such as trespassing, assault causing bodily harm, attempted injury, rioting and obstructing a police officer. Only two indictments were served solely for harming trees. When it comes to deliberate harm to olive trees, a crime that has come to symbolize both the occupation and the ideological crime perpetrated under its auspices, the incompetence of Israel’s law enforcement system is particularly glaring and gives the impression that the Israeli authorities take a casual approach to this type of crime and are not particularly eager to bring offenders to justice. Yesh Din’s ongoing monitoring data from the past years shows that when it comes to investigating damage to trees owned by Palestinians, the SJ District Police consistently fails to bring offenders to justice.

Four of the court cases opened following decisions to indict in these files are still pending at the time of writing. One resulted in an acquittal and another in a finding that the defendant did commit the acts attributed to him in the indictment, but without a conviction, sparing the defendant the implications of a criminal conviction.

The remaining indictments in cases monitored by Yesh Din (18.6 percent), were served following incidents Yesh Din classifies as seizure of Palestinian land, in other words, attempts by Israelis to take over Palestinian land by erecting fences, cultivating land, setting up structures, portable homes or greenhouses, preventing Palestinians from accessing their land, trespassing and more. Eleven of these 13 indictments were filed following two major incidents that occurred in late 2007, in which Israeli citizens tried to take over lands owned privately by Palestinians and establish illegal outposts on them: the outpost of Giv’at HaOr, established on land owned privately by Palestinians from the village of Beitin, and the outpost of Shvut Ami, established on land owned privately by a Palestinian resident of Kafr Qadum. In both cases, repeated attempts to remove the illegal outposts resulted in violent confrontations between the invaders and the Israeli security forces sent to remove them. As a result, in addition to trespassing, these indictments include

14 Yesh Din case 2995/13: In this case an indictment was filed in February 2014. It was subsequently amended twice and filed again in November 2014 (CrimC 8718-02-2014 State of Israel v. Landsberg et al.). In the amended indictment, two residents of the illegal outpost of Havat Gilad were charged with conspiring to commit a crime for racial motivations, arson committed jointly and vandalism of land for racial motivations (in the original indictment the two were also charged with an attempt to jointly commit arson and a joint attempt to cause property damage for racial motivations). A third defendant, also residing in the illegal outpost, was indicted in a different proceeding (CrimC 8751-02-2014 State of Israel v. Richter), in which, in addition to these offenses, he was also charged with breach of a legal order, as at the time of the arson, he was under house arrest. The first two defendants were convicted in a plea bargain in December 2014 and sentenced to two and a half years in prison and payment of 15,000 NIS in damages to the complainant. The third defendant was also convicted in a plea bargain, in February 2015, and sentenced to three years in prison and payment of 15,000 NIS in damages to the complainant.

15 Verdict, February 4, 2015, Para. 23.

16 Yesh Din cases 1243/07, 1280/07, 2559/12, 2680/12, 3033/14 and 3087/14.

17 See Yesh Din datasheets: Law Enforcement on Israeli Civilians in the West Bank (Yesh Din, November 2014), Police Investigations of Vandalization of Palestinian Trees in the West Bank, (Yesh Din, October 2013).
charges related to interference with government authorities, such as assaulting a police officer, obstructing a police officer or participating in an illegal assembly. In at least one of these 11 indictments, the charges were amended over the course of the legal proceeding, leaving only the charge of obstructing a police officer and erasing any trace of the original offense committed against the Palestinian landowners.18

The remaining indictments in cases of land seizure: one indictment served against a man who had buried an electrical cable in a private plot of land belonging to a resident of the Palestinian village of Thulth. The cable was to deliver electricity from the settlement of Ginot Shomron to the illegal outpost of Elmatan.19 Another indictment was served against a man who had cleared a road for vehicles on land owned privately by a Palestinian from Bethlehem.20 No other indictments were served in investigations monitored by Yesh Din into complaints made by Palestinians for seizure of land by Israelis. Israeli law enforcement agencies would have been expected to show better success rates in solving this type of crime, as it is easier to locate suspects and gather evidence against them.

**Indictments filed in Yesh Din cases, by type of offense**

- **13** [18.6%] Seizure of Palestinian land
- **14** [20%] Property offenses
- **43** [61.4%] Violent offenses

### PROCEEDING OUTCOMES

Legal proceedings are still pending in 13 of the 70 files monitored by Yesh Din, in which indictments were served against Israeli citizens. In the remaining 57 files, proceedings have been concluded and results can be analyzed.

It is difficult to provide a neat break down of the outcomes of the legal proceedings. Some of the indictments named more than a single defendant, and some of the proceedings ended with different results for different defendants. Cases involving a single defendant sometimes resulted in a conviction on some of the charges and acquittal on others. As a

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18 Yesh Din case 1319-2/07: In this case, an indictment was served against six defendants who had resided in the illegal outpost of Shvut Ami, and were present in the outpost at the time of its evacuation. The indictment originally included counts of criminal trespassing, obstructing a police officer in the line of duty and failure to assist a police officer in the line of duty. However, the indictment was ultimately amended to include a single count of obstructing a police officer. In this case, the indictment against one of the defendants was vacated, proceedings against two others were suspended, and three other defendants were found guilty, but not convicted.

19 Yesh Din cases 1210/06 and 1235/07: In these cases, a joint indictment was served against a single defendant in March 2007 (CrimC 1436/07). The defendant was a resident of the settlement of Ginot Shomron who was charged with failure to safeguard hazardous materials and installation of an electrical facility without a permit (under the Electricity Law). The charges were ultimately dropped on consultation with the State Attorney’s Office, and the case against the defendant was closed.

20 Yesh Din case 1710-2/09: In this case, an indictment was served against one defendant in May 2010 (CrimC 48263-05-10). The defendant was charged with trespassing after he had cleared a road on privately owned Palestinian land east of the settlement of Efrat. The case resulted in a finding of guilt against the defendant, but no conviction. He was sentenced to 60 hours of community service.
result, this datasheet follows the same breakdown used by the Judicial Authority Research Department, as presented in a May 2012 study of conviction and acquittal rates in criminal trials in Israel.21

The main categories used to describe the outcomes of legal proceedings are **full conviction**, meaning all defendants are convicted of all original counts; **partial conviction**, meaning some defendants are convicted of some counts, or convicted of lesser counts than those originally included in the indictment, **guilt without conviction**, meaning the court found that the defendant committed the offense or offenses attributed to him or her, but refrained from conviction; **acquittal** and **vacated or dropped indictments**.

The following is a breakdown of the outcomes of all cases monitored by Yesh Din, in which a decision was made to indict suspects:

- **Six cases ended with a full conviction** (10.5 percent of all files in which indictments were served);22
- **Thirteen cases ended with a partial conviction**. One case ended with the defendants convicted of some of the counts. Four cases ended with the conviction of only some of the defendants, and eight ended with the defendants convicted of lesser counts than originally included in the indictment. In most cases, the conviction on lesser counts was the result of a plea bargain between the defendants and the prosecution (22.8 percent of all files in which indictments were served);
- **Fourteen cases ended with a finding of guilt without a conviction** (24.6 percent of all files in which indictments were served);
- **Thirteen cases ended with the indictment vacated or dropped** after an indictment against one or more defendants was served (22.8 percent of all files in which indictments were served);
- **Five cases ended with an acquittal** (8.8 percent of all files in which indictments were served);
- **Four cases ended with results unknown to Yesh Din** (7 percent of all files in which indictments were served);
- **Two cases ended with different results**. One case was suspended and another, in which three defendants were indicted, ended with proceedings against one defendant suspended, charges against another dropped, and a finding of guilt without a conviction for the third defendant.

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21 Oren Gazal-Eyal, Itai Galon and Karen Winschel-Mergel, *Conviction and Acquittal Rates in Criminal Proceedings*, Judicial Authority Research Department and the University of Haifa Crime, Society and Law Research Department, 2012. As noted by the authors, the report was aimed at collecting information regarding verdicts and sentencing decisions in criminal cases heard by the District and Magistrates Courts as courts of first instance. In addition, the Judicial Authority study examined indictments according the total number of counts included, and therefore does not follow a polar division between "convictions" and "acquittals". The aim was to take other possible results of criminal cases into account, such as, withdrawal or vacation of indictment, withdrawal of some charges, findings of incompetence etc. With this in mind, it appears that the division used by the report’s authors, and a comparison between their data and the data presented in this datasheet is highly relevant to the issue discussed here. For more information about the Judicial Authority study and how it was conducted, see pp. 5-6 of the study.

22 One of these cases (Yesh Din case 1319-1/07) resulted in a full conviction only after the State’s appeal against the defendant’s acquittal of some of the charges was accepted.
Proceeding outcomes in Yesh Din cases in which indictments were filed

- **14 [24.6%]** Guilt without conviction
- **13 [22.8%]** Charges dropped/vacated
- **13 [22.8%]** Partial conviction
- **2 [3.5%]** Other
- **4 [7.0%]** Unknown
- **5 [8.8%]** Acquittal

The significance of this data is that of the total number of investigations under Yesh Din monitoring, and in which a decision to indict was made, **only a third of the proceedings (33.3%) culminated in full or partial convictions.** The remaining cases ended with acquittals, dropped or vacated indictments, suspension of proceedings, or findings of guilt without conviction. An examination of all legal proceedings that did not result in a conviction shows that the vast majority ended with one of two results: cancellation of an indictment after it was filed with the court and after the court began hearing the case, or a judicial finding that the defendant did commit the alleged offense, but no conviction.

**Vacated/dropped indictments**
A breakdown of the circumstances in which charges were dropped in 13 files monitored by Yesh Din reveals that most cases involved failure of investigation and prosecution officials to prove allegations against suspects, as well as delays in proceedings, failure of defendants to appear for court sessions and suspension of proceedings which ultimately led to the cancellation of the criminal case. In at least six of the cases that were ultimately cancelled, defendants failed to appear at some or all of the court sessions, and in most cases, the proceedings included fines issued against the defendants, capias warrants, arrest warrants, and sometimes a suspension of proceedings pending location of the suspects. In at least one case, the proceedings have been suspended to this day,23 and in another, the significant delays and the prolonged suspension resulted in what the police called “compromised evidence”. The charges were withdrawn and the proceeding was halted.24

As a rule, defendants’ failure to appear for court hearings in cases monitored by Yesh Din is a common occurrence. In total, of the 70 files monitored by Yesh Din, in which a decision to indict was made, in at least 18 cases Yesh Din members documented defendants’ failure to appear in court. In most cases, the failure to appear was systematic and

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23  Yesh Din case 1319-2/07.
24  Yesh Din case 1079/05.
occurred in more than one hearing. In at least 12 of these proceedings, failure to appear resulted in fines issued against defendants, capias warrants, arrest warrants or a suspension of proceedings.

In addition, in one case, the State Prosecution withdrew charges to avoid exposing major evidence that would have revealed classified information. An indictment for laying electrical infrastructure in an illegal outpost was dropped “on consultation with the State Attorney’s Office”, as stated in response to Yesh Din’s inquiries in the matter. Another case was withdrawn after a psychiatric expert opinion stated that the defendant was incompetent to stand trial. Yesh Din has no information about what led to the cancellation of the indictments in five other cases. Inquiries as to whether the court had made any comments that resulted in the indictments being vacated, and what these comments might have been, remain unanswered.

**Guilt without conviction**

The data shows that fourteen of the cases monitored by Yesh Din in which a decision was made to indict ended with a court finding that the defendant did commit the alleged offense, but no conviction; in only three of these cases the defendants were minors. In most cases, the finding of guilt was followed by community service imposed on the defendant, at the court’s discretion.

Court decisions to avoid convictions are meant to spare defendants the ramifications of a criminal conviction. Such decisions are reserved for special circumstances, or for cases in which the defendants have no criminal history, and the offense for which they are tried appears to be an irregularity rather than a pattern. This is a unique practice, and its use is limited. The Judicial Authority’s figures show that in the Magistrates Court, only 5.3 percent of defendants were found guilty but not convicted. In the District Court, the rate is even lower at only 1.2 percent.

Given this information, the fact that courts preferred not to convict Israeli defendants who harmed Palestinians in almost a quarter (24.6 percent) of the cases monitored by Yesh Din, is unusual and puzzling, all the more so considering that the offenses in question are not ordinary ones, but rather constitute ideologically motivated crime perpetrated against Palestinians in pursuit of political, ideological goals. As such, these offenses are especially heinous, and the Israeli judicial system is expected to be aware of this. The fact that courts prefer to avoid convicting Israelis who deliberately harm Palestinians in the West Bank undermines any deterring effect on other Israeli citizens from perpetrating similar crimes, and sends a clear message that law enforcement agencies do not consider these act to be particularly grave.

**CONCLUSION**

This datasheet is the first analysis of the results of investigation files opened by the SJ District Police and in which a decision was made to indict Israelis accused of committing offenses against Palestinians and their property. Within the larger context of Yesh Din’s decade long monitoring of investigations into ideological crime against Palestinians, the figures presented here help provide a fuller account of the state of law enforcement on Israeli citizens in the West Bank.

A fraction of the complaints filed with the SJ District Police by Palestinian victims of crimes perpetrated by Israelis result with a decision to indict the suspects (7.4 percent of all concluded investigations). In the rare cases in which indictments were filed, only half of the defendants were found guilty (10.5 percent of the investigations ended with full convictions, 22.8 percent of the cases ended with a partial conviction and 24.6 percent of the cases ended with a finding of guilt without a conviction. Added up, these cases make up 57.9 percent of the total number of cases). Finally, even in the

25 Response of then Head of the Samaria Prosecution Unit, Israel Police, Adv. Shir Lauper to Yesh Din’s inquiry dated October 27, 2008.

26 Section 71a(9) of the Penal Code stipulates, “Inasmuch as the court finds the defendant guilty of an offense, it may issue an order of service even without a conviction”.

cases in which the defendants were found by the court to have committed an offense, in more than 40 percent of the cases no conviction is made, and the courts limit themselves to the finding of guilt only.

The data’s significance is that a Palestinian who files a complaint with the SJ District Police has a mere 1.9 percent chance that his or her complaint will lead to an effective investigation that results in the identification of a suspect and followed by indictment, trial and conviction.

This sorry state of law enforcement is incongruent with Israel’s duty to protect Palestinians living in the West Bank, who, according to international law, are protected persons under the Israeli occupation. Moreover, this data contradicts the repeated declarations made by Israeli officials that Israel is determined to fight and end ideological crime, i.e. use of crime as a means of achieving political goals, in the West Bank. The incompetence exhibited by Israeli law enforcement agencies regarding this type of crime, the impunity of offenders and the absence of deterrence, raise serious doubts as to whether Israel is able to run an effective law enforcement regime in the territories it occupied.

**From complaint to conviction - a long journey**
Complaints, indictments and convictions in Yesh Din cases
LAW ENFORCEMENT ON IDF SOLDIERS SUSPECTED OF HARMING PALESTINIANS
Figures for 2014

229 investigations opened, 15 indictments served, the IDF does not know how many complaints were submitted

- In recent years, the IDF has not collected basic statistics on complaints and investigations into alleged offenses by soldiers against Palestinians. As a result, the Military Advocate General’s Corps is effectively unable to monitor these investigations or formulate clear, systematic policies on this issue.
- Over the last five years, just 3% of the criminal investigations launched by the Military Police Criminal Investigations Division into alleged offenses against Palestinians resulted in the indictment of suspects.
- Though most criminal investigations launched by the IDF in cases of harm to Palestinians involve violence, most of the indictments served concern property and bribery offenses.

BACKGROUND

Yesh Din publishes an annual data sheet regarding law enforcement on IDF soldiers suspected of harming Palestinians and their property in the West Bank and the Gaza Strip. The figures are based both on information provided by the IDF Spokesperson each year at Yesh Din’s request, and on the organization’s long-term monitoring of these statistics. The source of the data concerning indictments and rulings is Yesh Din’s own research and monitoring, based on copies of indictments and rulings provided by the IDF Spokesperson at Yesh Din’s request, in keeping with the principle of open justice.

The process of opening a criminal investigation against IDF soldiers suspected of offenses against Palestinians differs from the parallel civilian process in two key aspects. First, victims of offenses, or any other persons or agencies wishing to make a complaint about a suspected offense committed by an IDF soldier cannot simply go to the nearest Military Police Criminal Investigations Division (MPCID) base and submit one. This is because there are no MPCID bases or stations in the West Bank. Palestinian residents of the West Bank may file complaints at the District Coordination Offices (DCOs) located throughout the West Bank, or in Israeli police stations. However, in the experience of Yesh Din and other human rights organizations, many complaints filed to the DCOs are not forwarded to the appropriate investigating officials, or reach them after a significant delay. Submitting complaints to the Israel Police is also a difficult task for Palestinians, as some police stations are located inside Israeli settlements in the West Bank, which Palestinians are not permitted to enter without police escort. To add to that, there is often no Arabic speaking police investigator at the station to take the complainant’s statement. And so, complaints regarding suspected offenses by IDF soldiers are usually filed in writing to the MPCID or the Military Advocate General’s Corps (MAGO) – the majority through Israeli individuals and organizations.

1 The obstacles and difficulties faced by Palestinians who wish to file complaints have been discussed in detail in Yesh Din’s publications. See Yesh Din Reports Mock Enforcement: The Failure to Enforce the Law on Israeli Civilians in the West Bank (May 2015), p. 100; Alleged Investigation: The failure of investigations into offenses committed by IDF soldiers against Palestinians (July 2011) (hereinafter: Alleged Investigation), pp. 45-52.

2 Of the 239 reports received by the MPCID in 2014, only five were submitted by Palestinian victims of offenses independently; Of the 239 reports received by the MPCID in 2013, only six were submitted by Palestinian victims of offenses independently. Data based on the IDF Spokesperson’s responses to Yesh Din’s requests dated April 3, 2014 and June 25, 2015.
Second, a criminal investigation is not automatically opened every time military law enforcement authorities are informed of an incident. In some cases, the MPCID investigates on the basis of a report, but in others, the MAGC orders a preliminary inquiry, and the decision whether or not to investigate the incident is made only after the preliminary inquiry is completed.¹

As a general rule, current IDF policy on opening investigations (“investigation policy”) states that in case of a suspected offense committed during army operations, the decision to initiate a criminal investigation is subject to a preliminary inquiry. The preliminary inquiry usually relies on an operational debriefing⁴ conducted by the unit involved in the incident. On this basis, the MAGC decides whether or not to order an investigation.

The Turkel Commission, appointed by the Government of Israel to look into Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict, examined this issue in detail and addressed the difficulties arising from relying on operational debriefings as a tool for determining whether to launch criminal investigations. The Commission found it necessary to streamline and expedite the preliminary inquiry that precedes decisions whether to investigate, and recommended establishing a mechanism that would perform prompt, professional, factual assessments of incidents before the MAGC orders a criminal investigation.⁵ According to information published by the IDF, this preliminary factual assessment mechanism has, in fact, been established and was employed for assessing exceptional incidents that took place during Operation Protective Edge in Gaza in the summer of 2014.⁶ Yet from the information available, it appears that this mechanism does not currently address complaints and reports of suspected offenses committed by IDF soldiers in the West Bank. Another noteworthy fact is that although one of the purposes of this mechanism was to provide a swift factual assessment, over a year after the military campaign in Gaza ended the team has yet to complete its review of the incidents brought to its attention.

The policy under which a complaint is made to the MAGC and a decision as to whether or not to launch a criminal investigation is made only after a preliminary inquiry has several significant ramifications.

First, the division of labor between the MPCID and the MAGC requires close coordination between the two agencies and makes it difficult to monitor the progress of investigations. The MPCID investigates the complaints, while the MAGC currently receives most of the complaints and has the authority to decide whether to open a criminal investigation, and subsequently whether to serve an indictment or close the investigation. The fact that the MAGC does not assume responsibility for the entire process lead to a situation whereby there is not one body in the IDF charged with processing complaints, keeping records, monitoring the progress of preliminary inquiries and investigations and recording how long investigations take with an overall systemic outlook geared toward effective, exhaustive investigations.

Second, preliminary inquiries usually take months and sometimes even years.⁷ The long interval from the time of the incident or the complaint to investigation makes it difficult, and sometimes impossible, to conduct an effective investigation in cases that are ultimately referred for investigation.

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¹ For more on this policy see Alleged Investigation, pp. 23-24, 32-44.

² The operational debriefing is an internal examination used by commanders to draw operational conclusions and learn from operational failures. It is not intended for gathering evidence or determining individual criminal responsibility. For more on operational debriefings, see: Alleged Investigation, pp. 9, 34-38; Second Report of The Public Commission to Examine the Maritime Incident of 31 May 2010 [hereinafter: the Turkel Commission] Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law (February 2013) [hereinafter the Turkel Report], Section E: “Method of Conducting an Examination and an Investigation (‘How to Investigate?’),” pp. 336-339.


⁵ A sample examination conducted by the Turkel Commission revealed that in the files examined, the conclusions of the operation debriefing were provided to the MAGC only six, ten and even two years from the date of the incident. See, Turkel Report, p. 339.
This investigation policy is exacerbated by the fact that the IDF currently has no protocols or guidelines that set deadlines for the preliminary inquiry, the criminal investigation or the decision on whether or not to serve an indictment. As a result, the process is often protracted and in extreme cases can take years. Promptness is one of the basic and most important requirements for an effective investigation, and its importance was addressed by the Turkel Commission:

Time is a major factor that affects the ability to collect and preserve evidence, since crime scenes change, evidence disappears, memories fade, and witnesses may be threatened or might collude. Thus, collecting evidence promptly complements the principle of effectiveness and thoroughness. Furthermore, conducting an investigation within a reasonable timeframe can contribute to the perception that the law is being enforced and justice is being done. Important fora have noted this connection between promptness and public confidence in the law.\(^8\)

The team established to review and implement the recommendations made in the Turkel Report (the Ciechanover Commission) also addressed the need to establish clearly defined timetables for each stage of the criminal investigation process. After consulting with military officials, the Ciechanover Commission recommended a 14-week time limit for the process of reaching a decision as to whether or not to open an investigation, a nine-month cap on the investigation itself, and nine months for reaching a decision on the investigation file.\(^9\) The IDF is currently far from meeting the deadlines it itself suggested to the Ciechanover Commission, and experience gained by Yesh Din and other organizations shows that these proceedings take months, and sometimes years.

These two issues – the division of responsibilities between law enforcement bodies inside the IDF and unreasonably protracted law enforcement proceedings – have a crucial impact on the quality of law enforcement on IDF soldiers suspected of harming Palestinians. Yesh Din’s monitoring data, as well as figures and information published by other organizations, demonstrate that these mechanisms are highly ineffective. The result is lack of accountability on the part of security forces operating in the occupied territories under Israel’s control.

**B FIGURES FOR 2014**

1. Complaints

According to IDF figures, in 2014, the Military Police Criminal Investigations Division (MPCID) received 239 complaints of criminal offenses allegedly committed by IDF soldiers against Palestinians and their property in the West Bank and Gaza.\(^10\) This figure is almost identical to the figures for 2012 and 2013, when the MPCID received 240 and 239 complaints respectively.\(^11\)

Along with the complaints given directly to the MPCID, in many instances suspected offenses by soldiers against Palestinians are brought to the attention of the Military Advocate General’s Corps (MAGC), some through human rights organizations and media reports. Over the last two years, the IDF has asked human rights organizations, including Yesh Din, to report alleged offenses by soldiers toward Palestinians directly to the MAGC rather than the

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\(^8\) Turkel Report, p. 132


\(^10\) The source of all figures referring to the number of reports and the number of investigations opened in 2014 is information provided by the IDF Spokesperson in response to Yesh Din’s written request from June 25, 2015.

\(^11\) The source of these figures is information provided by the IDF Spokesperson in response to Yesh Din’s written requests from April 3, 2014 and January 23, 2013.
MPCID. The policy is ostensibly meant to expedite the process by bringing cases of harm to Palestinians directly to the attention of the MAGC, the agency in charge of ordering an investigation in many instances, at the initial complaint stage. However, because the MAGC is not accessible to ordinary Palestinians, this policy further distances Palestinian victims from the investigating agency itself and perpetuates their reliance on mediating bodies.

Figures provided to Yesh Din by the IDF Spokesperson indicate that the MAGC has no way of knowing how many reports it received regarding alleged offenses by IDF soldiers against Palestinians in 2014, or who gave them. The MAGC’s records do not “distinguish between reports opened following a specific incident and general communications”, as the IDF Spokesperson wrote, and include multiple communications regarding the same incident.\(^\text{12}\) This is a change for the worse, as in the past all complaints were made directly to the MPCID (the term used for them was “notifications”) and their number could be monitored yearly.

Even in the cases in which the Military Advocate for Operational Affairs Unit (MAOA) does order a criminal investigation, it does not monitor its progress. Yesh Din’s monitoring of past and on-going MPCID investigations and figures provided by the IDF Spokesperson demonstrate that the MAOA does not know how long criminal investigations take or how many of the investigations opened in a given year have been concluded. This is because of the MAGC and the MPCID use different systems for numbering and recording files. When the MAGC receives a report on an alleged offense against Palestinians, it opens a file and assigns it a certain number. When the file is transferred to the MPCID for investigation, it receives an internal MPCID number, and when it is returned to the MAGC for a decision on whether or not to indict, it is assigned a new number and counted as a new report received by the MAGC. If an additional investigation is ordered, the same process is repeated, and the file receives a new internal number by each agency handling it.

This means that the MAGC, the agency that oversees law enforcement and implementing justice inside the IDF, has no information about the number of reports the military receives regarding alleged offenses committed by soldiers against Palestinians, and does not know when criminal investigations are opened or how long they take. Consequently, the MAGC is incapable of formulating general policies for addressing known patterns of criminality, or monitoring and supervising the investigative process in order to improve IDF investigations.

This state of affairs is entirely at odds with the Turkel Commission’s recommendations, which held that time frames must be set for completing IDF investigations and placed the responsibility for enforcing this squarely on the shoulders of the MAGC. In their recommendation addressing time limits for IDF investigations, the Commission wrote: “In order to guarantee that the regulated timeframe is adhered to, and in order to allow for adequate review, the MAG[C] shall publish, at least once a year, statistical data on the period of time taken to handle files”.\(^\text{13}\) Since the MAG does not know how long MPCID investigations take, it is obviously unable to monitor or supervise their duration, let alone provide any statistics on the matter.

**2. Investigations**

**In 2014 there was a slight increase in the number of criminal investigations opened by the MPCID.** Of the 239 reports received by the MPCID in 2014, 156 led to criminal investigations, as well as three investigations based on media reports of alleged offenses by soldiers. Investigations were also opened regarding 70 reports received in previous years. **In total, the MPCID opened 229 criminal investigations into incidents of harm caused to Palestinians and their property,** of which 209 occurred in the West Bank and 20 in the Gaza Strip.

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\(^{12}\) From the response of the IDF Spokesperson to Yesh Din’s written request from June 25, 2015.

\(^{13}\) *Turkel Report*, Recommendation No. 10: Establishing the Investigation Timeframe, paragraph 66, page 399.
To compare, in 2013, criminal investigations were opened following 124 reports received in that year, as well as 75 additional investigations based on reports made in 2012, bringing the total number of criminal investigations into harm to Palestinians opened in 2013 to 199.

As stated, 70 of the investigations ordered in 2014 were opened after some delay, following reports made to the MPCID back in 2013. In other words, 30% of the 229 investigations. Frequent delays in investigations characterize the military law enforcement system in previous years as well. For instance, almost 40% of the investigations opened in 2013 were based on reports that had reached the MPCID in 2012.¹⁴

These figures, along with the experience Yesh Din has gained through monitoring complaints submitted to the MAGC, indicate how slowly the military law enforcement system operates, which directly affects the quality of investigations. Naturally, the more time that elapses from the incident, the less likely the investigation is to be effective.

Since most soldiers only serve in the military for a period of a few years, the slow progress of the military law enforcement system is critical: under the Military Justice Law, a soldier cannot be indicted for an offense committed during service more than 180 days after his or her discharge from the army, or one year if the alleged offense is more serious.¹⁵ As a result of delays in reaching decisions as to whether to launch an investigation, protracted investigations, and the lengthy process of determining whether to serve an indictment or close the file,¹⁶ some soldiers suspected of offenses complete their military service without being indicted, and later cease to be subject to the Military Justice Law. Only the Attorney General may decide to prosecute a person who is no longer subject to the Military Justice Law.

The time that elapses between the complaint and the decision to launch a criminal investigation makes it impossible to know how many of the reports made in 2014 will ultimately be investigated. Based on figures from previous years, it is reasonable to assume that in many complaints made in 2014, the decision as to whether or not to investigate will only be made in 2015. Long-term statistics indicate that the number of criminal investigations opened between 2000 and 2014 is 64% of the reports filed.

¹⁴ See Yesh Din, Law Enforcement upon IDF Soldiers in the Occupied Palestinian Territory: Figures for 2013, September 2014, Section A.

¹⁵ Article 6 of the Military Justice Law establishes that in the case of military offenses entailing imprisonment of two years or more, non-military offenses defined as crimes - i.e. a criminal offense entailing imprisonment of three years or more – and offenses of involuntary manslaughter or vehicular involuntary manslaughter, the law will apply to a person suspected of the offense for up to one year after discharge from the IDF.

¹⁶ Yesh Din’s figures show that one of the main bottlenecks responsible for the lengthy law enforcement proceedings is caused when the MPCID investigation is completed and the file is forwarded to the MAGC for a decision on whether to serve an indictment or close the file. An examination of several dozen such investigation files by Yesh Din showed that on average, it takes the MAGC approximately 14 months to reach a decision. In a substantial number of cases, no decision was made two years after the investigation was completed. See: Alleged Investigation, pp. 86-94.
### Complaints made to MCPID and criminal investigations into alleged harm to Palestinians*, 2000-2014

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<td>2010</td>
<td>477</td>
<td>11</td>
</tr>
<tr>
<td>2011</td>
<td>351</td>
<td>11</td>
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<tr>
<td>2012</td>
<td>323</td>
<td>11</td>
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<tr>
<td>2013</td>
<td>153</td>
<td>11</td>
</tr>
<tr>
<td>2014</td>
<td>292</td>
<td>11</td>
</tr>
</tbody>
</table>

**Note:**
- *The number of investigations opened does not relate to the total number of complaints provided to the MPCID in the same year, as some of the complaints are made by other sources and many investigations are opened in the year following the complaint.*
- **This statistic includes only complaints submitted directly to the MPCID. The number of complaints submitted to the MAGC at the same time is unknown, as, according to the IDF Spokesperson, the MAGC does not keep records regarding this statistic.*

A long-term perspective reflects a **certain increase in the number of criminal investigations into incidents of harm to Palestinians**. As demonstrated in the graph, the number of complaints made to the MPCID did not differ between 2011 and 2014, while the number of investigations opened has consistently increased.

This change may be the result of the IDF’s new policy with respect to incidents involving the death of a Palestinian civilian. Following a petition to the High Court of Justice, in April 2011, the State announced that the MPCID would automatically investigate any civilian fatality caused by the military in the West Bank, unless the incident in question was “clearly part of a combat situation.”

According to IDF figures, 2014 was a particularly fatal year, in which the MPCID launched criminal investigations into 41 incidents in which Palestinian civilians were killed.

### 3. Types of Offenses

Of the investigation files initiated by the MPCID in 2014, 41 (18%) were opened following the death of Palestinian civilians (33 incidents in the West Bank and eight in the Gaza Strip). This is an unusually high number of investigations into fatalities compared to previous years (15 investigations in 2013 and 2012 and nine in 2011). This high number is likely the combined result of the change to the military’s investigation policy and the fact that 2014 was a particularly deadly year in the West Bank compared to previous years. According to figures published by B’Tselem, 46 civilians were killed in the West Bank that year, compared to 27 in 2013, eight in 2012 and ten in 2011.\(^\text{17}\)

Of the investigation files, 154, or 67%, were opened following incidents involving violence and injuries (149 in the West Bank and five in the Gaza Strip). An additional 20 files (9%) were opened following complaints of incidents involving damage to property or looting (13 in the West Bank, seven in the Gaza Strip). A further 14 investigations were opened following incidents described by the IDF Spokesperson as “inappropriate conduct.”\(^\text{18}\)

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\(^{17}\) Notice of the MAGC dated April 6, 2011 in HCJ 9594/03, B’Tselem - The Israeli Information Center for Human Rights in the Occupied Territories and the Association for Civil Rights in Israel v. Military Advocate General.


\(^{19}\) In response to Yesh Din’s inquiry as to what incidents fall under this category, the IDF Spokesperson replied in a letter dated July 21, 2014, that these are “incidents that do not fall into any of the above category, such as a soldier who made statements that are incongruent with the IDF’s values, or whose
4. Indictments

Of the 229 investigations opened in 2014, eight (3.5%) have thus far led to indictments served against 11 soldiers suspected of harming Palestinians or their property. In total, 15 indictments against 15 soldiers were submitted to the Courts-Martial in 2014 following incidents involving harm to Palestinians: eight resulted from investigations opened in 2014 and seven from investigations opened in 2013.

There has been a significant increase in the number of indictments served to the Courts-Martial against soldiers suspected of harming Palestinians during the past two years. In 2013-2014, 17 (4%) of 428 investigation files led to indictment of soldiers involved in harming Palestinians; in these files, 24 indictments were served against 25 soldiers. In contrast, in the preceding three years, 2010 to 2012, just eight (2%) of 401 investigations led to the indictment of 11 soldiers accused of harming Palestinians.

In total, from the beginning of the second intifada in 2000 to the present, the MAGC has submitted indictments in 136 cases, accounting for 5.2% of the investigations opened. These indictments related to a total of 223 soldiers and officers accused of various offenses against Palestinians.

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conduct was morally flawed”. In May 2015, the military legal provision that defines this offense and sets out policies with respect to penalties and sentencing arguments relating it, Chief Military Prosecutor’s Order No. 2.19, was amended. The order is available (in Hebrew) on the MAGC’s website: www.law.idf.il/SIP_STORAGE/files/3/1733.pdf.

One of these investigation files, opened in 2014, resulted in indictment only in 2015. Given that past experience shows that some indictments are served long after the investigation begins, additional indictments may be served in the future.
There is obviously no minimum or target number of indictments Yesh Din believes the military should meet. Yet the rate of indictments is notably low given that a great many of these investigations are opened only after a preliminary inquiry is conducted, the military usually knows who the suspects are, the suspects are relatively easy to find, and that many Palestinians choose not to report harm in comparatively light cases. This is indicative of a deep, ongoing failure to conduct exhaustive investigations that are able support indictments and reflects a situation of near impunity for soldiers. Of the total reports submitted to the MPCID from 2000 to 2014, only 3.3% have so far resulted in the prosecution of soldiers on charges of harming Palestinians.

A thorough review of indictments served in the Courts-Martial in 2014 shows that though most investigations related to violent offenses, most of the indictments (nine out of 15) were served in bribe or property-related offenses. Many of these offenses involved theft of small amounts of money or possessions with little value. More severe incidents, in which Palestinian civilians were wounded or killed, hardly ever led to indictments over the past year. The only indictment that was served regarding a fatality, a case involving the death of a Palestinian civilian who was shot in breach of the open-fire regulations, ended in an acquittal. The remaining five indictments concerned violent incidents in which soldiers beat or assaulted Palestinian detainees who were handcuffed and in custody.

**Indictments served in 2014 for offenses against Palestinians, by type of offense**

- 9 Property and bribery
- 5 Violence
- 1 Death
- 4 stealing/looting
- 4 bribery
- 1 damage to a car

**Details of indictments served in 2014**

1. In January 2014, an indictment was served against a reserves soldier accused of assaulting a Palestinian in October 2012. The soldier kicked the handcuffed Palestinian, who had tried to cross the Jayus checkpoint and beat him with his weapon. He was charged with simple assault and misconduct. However, in June 2014, the prosecution withdrew the indictment and the soldier was acquitted.

22 CM (Central Command Jurisdiction District) 20/14, Military Prosecutor v. Private M.G.

2. In January 2014, an indictment was served against a soldier who had served as a guard in the Etzion temporary holding facility. The soldier was accused of stealing 900 shekels (roughly 230 USD) from an envelope belonging to a Palestinian detainee in October of 2013. He was charged with theft and misconduct. The soldier was acquitted.

21 CM (Home Front Command Jurisdiction District) 2/14, Military Prosecutor v. Staff Sergeant (reserves) A.A.

22 CM (Central Command Jurisdiction District) 20/14, Military Prosecutor v. Private M.G.
convicted in a plea bargain in August 2014 and sentenced to 40 days in prison, a 60-day suspended prison sentence and a 400-shekel fine (roughly 100 USD).

3. In January 2014, an indictment was served against a soldier who was accused of attacking a Palestinian detainee in May 2013. The attack occurred while the detainee was being released from detention in the Shomron Brigade base. He was blindfolded and his hands were held behind his back by two other soldiers at the time. The accused soldier was charged with simple assault and threatening and insulting a commanding officer. He was convicted of simple assault in a plea bargain in June 2014 and sentenced to two months in prison, a month of military labor, a 90-day suspended prison sentence and a 350-shekel fine (roughly 90 USD).

4. In May 2014, an amended indictment was served against a coordination and liaison NCO at the Civil Administration, accused of accepting bribes from Palestinians in exchange for issuing Israeli permits between September 2012 and December 2013. He was also accused of forging dozens of documents for the purpose of issuing entry permits. The indictment against the soldier listed six incidents of bribery, dozens of incidents of exceeding authority in a manner that threatens national security, forgery by a public servant, fraud, breach of trust, possession of drug paraphernalia (under the Dangerous Drugs Ordinance), refusal to undergo drug testing, and misconduct. He was convicted in a plea bargain and sentenced to 16 months in prison, a 3-month suspended prison sentence, a 4,000-shekel fine (roughly 1,025 USD) and a demotion to private.

5. In May 2014, an amended indictment was served against a Major accused of receiving benefits, between December 2012 and December 2013, from a Palestinian he met while serving in the military. The officer received a security camera, a bike rack, an iPhone and car services among other things. He was charged with fraud, breach of trust and misconduct. He was convicted in a plea bargain and sentenced to four months of military labor, a 12-month suspended prison sentence and was demoted to captain. Following an appeal against the severity of the sentence, the Court Martial Appeal Court reversed the demotion.

6. In June 2014, an indictment was served against a combat soldier who was accused of willfully causing damage to a car belonging to a Palestinian resident during operational activity in Hebron in November 2013. The soldier had used his weapon to damage the car, and ripped off its radio antenna. He was charged with willful damage and misconduct and convicted in a partial plea bargain. He was sentenced to 45 days of military labor, a 90-day suspended prison sentence, payment of 2,650 shekels (roughly 680 USD) in compensation to the car owner and a demotion to sergeant.

7. In June 2014, two indictments were served against two IDF combat soldiers accused of stealing from a store belonging to a Palestinian. The indictments include descriptions of how one of the soldiers stole poppers, a folding club, five spark plugs and an electric shock key chain during a military search for weapons in the village of Barta’ah in the Jenin district in March 2014. The other soldier stole a folding club. The two soldiers were charged with theft and misconduct, but were ultimately convicted only of exceeding authority in a plea bargain. Each of the soldiers was sentenced to 12 days in prison, which included time spent in detention following the incident, a 30-day suspended prison sentence and a 300-shekel fine (roughly 75 USD).

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23 CM (Central Command Jurisdiction District) 26/14, Military Prosecutor v. Private B.A.
24 CM (General Staff Jurisdiction District) 48/14, Military Prosecutor v. Sergeant A.R.
25 CM (General Staff Jurisdiction District) 77/14, Military Prosecutor v. Major M.A.
27 CM (Southern Command Jurisdiction District) 214/14, Military Prosecutor v. Staff Sergeant R.A.
28 CM (Southern Command Jurisdiction District) 190/14 and 191/14, Military Prosecutor v. Staff Sergeant A.L. and Military Prosecutor v. Staff Sergeant H.K.
8. In July 2014, an indictment was served against a soldier accused of beating and punching a Palestinian detainee he was escorting in a car in an incident that took place in August 2012. The detainee was handcuffed and blindfolded at the time.\textsuperscript{29} The soldier was charged with physical abuse and misconduct. The trial was still pending at the time of writing.

9. In July 2014, an indictment was served against a company commander in the Home Front Command who was the commanding officer during a January 2013 incident in which Palestinian civilian Udai Darwish was shot and killed after attempting to enter Israel through a gap in the Separation Barrier in the South Hebron Hills area.\textsuperscript{30} The soldier who fired the shots that killed Darwish was prosecuted in March 2013 and convicted of involuntary manslaughter and sentenced to five months in prison, including the five months spent in detention, a five-month suspended prison sentence and a demotion to sergeant. Last year, the supervising commander was also prosecuted on charges of involuntary manslaughter for his conduct during the incident. According to media reports, the officer’s trial ended in an acquittal in May 2015.\textsuperscript{31}

10. In October 2014, an indictment was served against a Major in the Civil Administration, who was accused of issuing hundreds of Israeli entry permits to Palestinians, in breach of protocol and in return for monetary and other benefits that were provided to him through a Palestinian middle man.\textsuperscript{32} The officer was charged with bribery, exceeding authority in a manner that threatens national security, aiding illegal entry into Israel, fraud, breach of trust and misconduct. In January 2015, charges of forgery and obtaining property through false pretenses were also added to the indictment. At the time of writing, the officer’s trial was still pending.

11. In November 2014, an indictment was served against a reserves soldier accused of beating a handcuffed Palestinian detainee he was guarding near the gate of the settlement of Beit El in August 2014.\textsuperscript{33} The soldier was charged with physical abuse and misconduct. His trial was still pending at the time of writing.

12. In November 2014, an indictment was served against a soldier accused of kicking and punching a Palestinian detainee during his service in a military incarceration facility. Both the detainee’s hands and feet were in restraints at the time.\textsuperscript{34} The soldier was charged with simple assault. At the time of writing, his trial was still pending.

13. In December 2014, an indictment was served against a combat soldier accused of looting objects from the car of a Palestinian resident who was crossing a checkpoint at the Gush Etzion intersection.\textsuperscript{35} According to the indictment, when the soldier was searching the car, he took two car lights, an LED light strip, an external flashing light and a CD player. The soldier hid the items in his vest and later sold most of them for 200 shekels (roughly 50 USD). He was charged with looting and misconduct, and was convicted in a plea bargain in January 2015. He was sentenced to 120 days in prison, including time spent in detention, a four-month suspended prison sentence, payment of 810 shekels in compensation to the complainant, and a demotion to private.

14. In December 2014, an indictment was served against a soldier who served as a security profiler and was accused of allowing Palestinian vehicles to pass through a checkpoint at the entrance to the Palestinian community of Azzun ‘Atmah in the Qalqiliyah District, in breach of protocol and in return for bribes, for a period stretching from

\textsuperscript{29} CM (Central Command Jurisdiction District) 330/14, Military Prosecutor v. Staff Sergeant A.A.
\textsuperscript{30} CM (Home Front Command Jurisdiction District) 105/14, Military Prosecutor v. Captain A.R.
\textsuperscript{31} A request for clarification on this matter sent to the IDF Spokesperson has not been answered at the time of writing.
\textsuperscript{32} CM (General Staff Command Jurisdiction District) 1031/14, Military Prosecutor v. Major Y.Y.
\textsuperscript{33} CM (Central Command Jurisdiction District) 537/14, Military Prosecutor v. Corporal Z.A.
\textsuperscript{34} CM (General Staff Command Jurisdiction District) 1171/14, Military Prosecutor v. Corporal Z.A.
\textsuperscript{35} CM (Central Command Jurisdiction District) 650/14, Military Prosecutor v. Sergeant K.A.
August to November of 2014. After the soldier received 200 shekels in return for allowing a car to go through the checkpoint in three incidents, the indictment listed five counts of exceeding authority and three counts of bribery. In February 2015, he was convicted in a plea bargain of the lesser offenses of failure to carry out orders, fraud and breach of trust. He was sentenced to five and-a-half months in prison, a 12-month suspended prison sentence and a demotion to private.
Report on Preliminary Examination Activities
(2015)

12 November 2015
45. On 1 January 2015, the Government of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the Court with respect to alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.” On 2 January 2015, the Government of Palestine deposited an instrument of accession to the Statute with the UN Secretary-General (“UNSG”). The Rome Statute entered into force for Palestine on 1 April 2015, pursuant to article 126 of the Statute.

46. On 16 January 2015, the Prosecutor opened a preliminary examination of the situation in Palestine, in accordance with Regulation 25(1)(c) of the Regulations of the Office and the Office’s policy on preliminary examinations.

47. The Office has received 66 communications pursuant to article 15 in relation to crimes alleged to have been committed since 13 June 2014.

48. The Office previously conducted a preliminary examination of the situation in Palestine upon receipt of a purported article 12(3) declaration lodged by the Palestinian National Authority on 22 January 2009. The Office carefully considered all legal arguments submitted to it and, after thorough analysis and public consultations, concluded in April 2012 that Palestine’s status at the UN as an “observer entity” was determinative, since entry into the Rome Statute system is through the UNSG, who acts as treaty depositary. The Palestinian Authority’s “observer entity,” as opposed to “non-member State” status at the UN, at the time meant that it could not sign or ratify the Statute. As Palestine could not join the Rome Statute at that time, the Office concluded that it could also not lodge an article 12(3) declaration bringing itself within the ambit of the treaty, as it had sought to do.

49. On 29 November 2012, the UN General Assembly (“UNGA”) adopted Resolution 67/19 granting Palestine “non-member observer State” status in the UN by majority: 138 votes in favour, nine votes against and 41 abstentions. The Office examined the legal implications of this development for its own purposes and concluded, on the basis of its previous extensive analysis of and consultations on the issues, that, while the change in status did not retroactively validate the previously invalid 2009 declaration lodged without the necessary
standing, Palestine would be able to accept the jurisdiction of the Court from 29 November 2012 onward, pursuant to articles 12 and 125 of the Rome Statute. The Rome Statute is open to accession by “all States,” with the UNSG acting as depositary of instruments of accession.

50. On 2 January 2015, Palestine deposited its instrument of accession to the Rome Statute with the UNSG. As outlined in the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, “the Secretary-General, in discharging his functions as a depositary of a convention with an ‘all States’ clause, will follow the practice of the [General] Assembly in implementing such a clause […].” The practice of the UNGA “is to be found in unequivocal indications from the Assembly that it considers a particular entity to be a State.” In accordance with this practice and specifically UNGA Resolution 67/19, on 6 January 2015, the UNSG, acting in his capacity as depositary, accepted Palestine’s accession to the Rome Statute, and Palestine became the 123rd State Party to the ICC. It was welcomed as such by the President of the Assembly of States Parties to the Rome Statute.

51. Likewise, on 7 January 2015, President Mahmoud Abbas was informed by the ICC Registrar of the latter’s acceptance of the article 12(3) declaration lodged by the Government of Palestine on 1 January 2015, and that the declaration had been transmitted to the Prosecutor for her consideration.

52. The Office considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a “State” for the purposes of accession to the Rome Statute (in accordance with the “all States” formula). Additionally, as the Office has previously stated publicly, the term “State” employed in article 12(3) of the Rome Statute should be interpreted in the same manner as the term “State” used in article 12(1). Thus, a State that may accede to the Rome Statute may also lodge a declaration under article 12(3).

53. For the Office, the focus of the inquiry into Palestine’s ability to accede to the Rome Statute has consistently been the question of Palestine’s status at the UN. The UNGA Resolution 67/19 is therefore determinative of Palestine’s ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.

54. The Office’s conclusions with respect to the validity of the article 12(3) declaration lodged by the State of Palestine on 1 January 2015 are without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court.

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17 UN Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, U.N. Doc. ST/LEG/7/Rev.1, paras. 81-83.
19 Letter from ICC Registrar to President Mahmoud Abbas, 7 January 2015.
Contextual Background

Gaza

55. The conflict in Gaza stems as far back as Israel’s occupation of the territory beginning in 1967 and its subsequent conflicts with the organised groups operating in Gaza. In 2005, Israel unilaterally disengaged from Gaza, and shortly thereafter Hamas gained control over the Gaza Strip, following its electoral victory in 2006.

56. In response to increasing rocket attacks, in 2007, Israel declared that Hamas had turned Gaza into “hostile territory” and took sanctions against Hamas, imposing restrictions on the passage of certain goods to Gaza and the movement of people to and from Gaza. In January 2009, Israel also imposed a naval blockade of the Gaza Strip, as an extension of the previously imposed land crossing restrictions. Two major military operations were also launched in Gaza by Israel in 2008 and 2012.

57. Despite occasional ceasefires, periodic rocket attacks by Hamas and affiliated armed groups, military incursions into Gaza by Israel, and clashes between the two sides continued in the subsequent years.

58. On 12 June 2014, three Israeli teenagers were kidnapped and murdered in the West Bank. In response, Israel launched an extensive search and arrest operation named “Brother’s Keeper,” which lasted until the bodies of the three Israeli teenagers were found on 30 June. On 7 July 2014, the Israel Defense Forces (“IDF”) commenced operation “Protective Edge” in the Gaza Strip, with the stated objectives of destroying Hamas and other armed groups’ military infrastructure, particularly with respect to their rockets and mortar launching capabilities, and neutralising their network of cross-border assault tunnels. After an initial phase focused on air strikes, Israel launched a ground operation on 17 July 2014, followed by a third phase of the operation between 5-26 August characterised by alternating ceasefires and aerial strikes.

West Bank and East Jerusalem

59. As a result of the Six-Day War in 1967, Israel acquired control over the West Bank and East Jerusalem. Shortly thereafter, Israel adopted laws and orders effectively extending Israeli law, jurisdiction and administration over East Jerusalem and purporting to unite West and East Jerusalem. In 1980, the Knesset passed a law declaring Jerusalem, complete and united, the capital of Israel.

60. Pursuant to the Oslo Accords, the Palestine Liberation Organisation was recognised as the official representative of the Palestinian people in 1993, and Israel transferred security and civilian control of certain Palestinian-
populated areas of West Bank to the Palestinian Authority ("PA"), which was formed in 1994 as the interim governing body of such areas. Under the accords, West Bank is divided into three administrative divisions (Area A – full civil and security control by the PA; Area B – Palestinian civil control and joint Israeli-Palestinian security control; Area C – full civil and security control by Israel). The accords also provided a framework to facilitate negotiations between the two parties for a peaceful resolution of the conflict.

61. To date, no final peace agreement has been reached, and remaining unresolved issues between the parties include determination of borders, security, water rights, control of Jerusalem, Israeli settlements in the West Bank, refugees, and Palestinian freedom of movement.

**Alleged Crimes**

62. The following summary of alleged crimes is preliminary in nature and is based on publicly available reports as well as information received by the Office. The descriptions below are without prejudice to the identification of any further alleged crimes which may be made by the Office in the course of its analysis, and should not be taken as indicative of or implying any particular legal qualifications or factual determinations regarding the alleged conduct.

**Gaza conflict**

63. The conflict in Gaza between 7 July and 26 August 2014 allegedly caused a high number of civilian casualties. According to multiple sources, over 2,000 Palestinians, including over 1,000 civilians, and over 70 Israelis, including six civilians, were reportedly killed, and over 11,000 Palestinians and 1,600 Israelis were reportedly injured as a result of the hostilities. These casualty figures include both civilians and combatants on both sides. Casualty figures reported by various sources differ on the number of overall casualties, the proportion of civilians to combatant casualties, and the proportion of civilian casualties that were incidental to the targeting of military objectives. All parties are alleged to have committed war crimes during the 51-day conflict.

64. **Alleged crimes by Palestinian armed groups:** According to UNDSS, Palestinian armed groups allegedly indiscriminately fired 4,881 rockets and 1,753 mortars towards Israel. At least 243 of these projectiles were intercepted by Israel’s Iron Dome missile defence system, while at least 31 fell short and landed within the Gaza Strip. Six civilians, including one child, were

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reportedly killed in Israel as a result of these attacks, and many more sustained injuries or were displaced. It is alleged that rocket attacks that were aimed at Israel but fell short also caused civilian casualties and damage to civilian objects within the Gaza strip.

65. Attacks by Palestinian armed groups were allegedly launched from civilian buildings and compounds, including schools, hospitals and buildings dedicated to religion. Civilian buildings and facilities were also allegedly used for other military purposes, such as storing munitions.

66. Additionally, between 21 and 23 August 2014, over 20 Palestinians accused of collaborating with Israel were reportedly summarily executed by gunmen alleged to have been acting on instructions from Hamas. The majority of them were allegedly taken from Katiba Prison in Gaza City and summarily executed, while the others were allegedly executed in other locations.

67. Alleged crimes by IDF: On the Israeli side, IDF attacks were allegedly directed against civilian residential buildings and infrastructure, UN facilities, hospitals, paramedics and ambulances, and further included allegedly indiscriminate attacks in densely populated civilian neighbourhoods. In particular, according to UN Office for the Coordination of Humanitarian Affairs (“OCHA”), intense artillery shelling and aerial strikes alongside fierce ground fighting in Ash Shuja’iyeh neighbourhood between 19-21 July 2014, allegedly resulted in hundreds of civilian fatalities, including many women and children. Widespread destruction of civilian buildings and infrastructure was also reported. Dozens of civilian casualties were also reported during several incidents of artillery fire on the town of Khuza’a, east of Khan Yunis, between 23-25 July 2014. Between 1-3 August 2015, massive bombardment of the Rafah area reportedly caused more than one hundred civilian casualties.

West Bank and East Jerusalem

68. Successive Israeli governments have allegedly led and directly participated in the planning, construction, development, consolidation and/or encouragement of settlements on West Bank territory occupied during the Six-Day War (June 1967). This settlement activity is allegedly created and maintained through deliberate implementation of a carefully conceived network of policies, laws, and physical measures. Such activities are alleged to include the planning and authorisation of settlement expansions or new construction at existing settlements; the confiscation and appropriation of land; demolitions of Palestinian property and eviction of residents; and a scheme of subsidies and incentives to encourage migration to the settlements and to boost their economic development.

69. In 2014, the Israeli government reportedly destroyed 590 Palestinian-owned structures in the West Bank, including East Jerusalem, displacing 1,177
people, according to figures published by OCHA. An additional 77 Palestinians, over half of them children, were reportedly displaced in January 2015 due to the demolition of 42 Palestinian-owned structures in the Ramallah, Jerusalem, Jericho and Hebron governorates by Israeli authorities. OCHA reported that during the first half of 2015, the Israeli Civil Administration demolished 245 Palestinian structures. In August 2015, 228 Palestinians, including 124 minors, were allegedly displaced as a result of demolitions in 29 villages and communities, primarily in the Jordan Valley and the Ma’ale Adumim area.

70. With respect to settlement-related activities, the Office has also received information related to acts of violence allegedly committed by settlers against Palestinian communities.

71. Allegations concerning ill-treatment of Palestinians arrested, detained and prosecuted in the Israeli military court system have also been reported, including, for example, allegations of systematic and institutionalised ill-treatment of Palestinian children in relation to their arrest, interrogation, and detention for alleged security offences in the West Bank.

**OTP Activities**

72. Since the initiation of the preliminary examination in January 2015, the Office has focused on gathering relevant information from reliable sources. This includes publicly available information, information from individuals or groups, States, and intergovernmental or non-governmental organisations, including from the UN system. The Office gathered a large volume of information in the public domain and has taken steps to analyse and verify the seriousness of information received, including through a rigorous and independent source evaluation process.

73. The Office received and responded to a large number of queries from potential information providers, regarding procedures and modalities for the submission of information pursuant to article 15 of the Statute. Subject to any future legal process, the confidentiality of all information submitted under article 15 is protected, as is the identity of the information provider, unless the provider chooses to waive that confidentiality.

74. The Office also sought the cooperation of key information providers such as the Governments of Palestine and Israel. On 25 June 2015, the Palestinian Minister of Foreign Affairs, H.E. Riad al-Maliki, submitted a communication pursuant to article 15 of the Statute regarding alleged crimes committed in Palestine. Further information was submitted by Palestine on 3 August and 30 October 2015.
On 9 July 2015, the Government of Israel announced that it had decided to open a dialogue with the Office over the preliminary examination. In May 2015, the Government of Israel published a report on factual and legal aspects of the 2014 Gaza Conflict.

**Conclusion and Next Steps**

The Office is in the process of conducting a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed. In accordance with its policy on preliminary examination, the Office may gather available information on relevant national proceedings at this stage of analysis. Any decision on whether there is a reasonable basis to proceed with an investigation will be based on an independent and impartial analysis of all reliable information available to the Office, in application of the legal criteria set forth in article 53 of the Statute.

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Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 5765 – 2005

1. **Addition of articles 5B to 5E**

In *Hoq ha-Neziqin ha-Ezrahayim (Ahrayut ha-Medina)* [Civil Wrongs (Liability of the State) Law], 5712-1952¹ (hereinafter: the principal law), after article 5A, shall come:

5B. **Claims by an enemy and a person who is active in, or a member of, a terrorist organization**

(a) Notwithstanding the provisions of any law, the State is not civilly liable for damages caused to the persons set forth in paragraphs (1), (2) or (3), except for an injury sustained in the kinds of claims or to the kinds of claimants set forth in the First Annex -

(1) a subject of a state that is an enemy, unless the person is staying lawfully in Israel;

(2) a person who is active in, or a member of, a terrorist organization;

(3) a person who was injured while acting as an agent or on behalf of a subject of an enemy state, a member of a terrorist organization, or a person active therein.

(b) In this article –

“enemy” and “terrorist organization” have the same meaning as in article 91 of *Hoq ha-Oneshin* [Penal Law], 5737–1977.²

“The State” includes an authority, body, or person acting on its behalf.

5C. **Claims in a zone of conflict**

(a) Notwithstanding the provisions of any law, the State is not civilly liable for damages sustained in a zone of conflict as a result of an act that was carried out by the security forces except for injury that is sustained in the kinds of claims or to the kinds of claimants set forth in the Second Annex.

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² Sefer ha-Huqqim 5737 [1977], p. 322.
(b) (1) The Minister of Defense shall appoint a committee, which shall be authorized to approve, beyond the letter of the law, in special circumstances, payment to a claimant as to whom sub-article (a) applies and to set the amount of the payment (in this sub-article – the Committee);

(2) The members of the Committee shall be:

   (1) An attorney qualified to be appointed district court judge, who shall be the chairperson; the Minister of Defense shall appoint the chairperson upon consultation with the Minister of Justice;

   (2) A representative of the Ministry of Defense;

   (3) A representative of the Ministry of Justice;

(3) The Minister of Defense, upon consultation with the Minister of Justice, and with the approval of the Knesset’s Constitution, Law and Justice Committee, shall establish the preliminary conditions for applying to the Committee, the manner in which the application shall be made, the Committee’s work procedures, and the criteria for payment beyond the letter of the law.

c) The Minister of Defense may declare a territory a zone of conflict; where the minister so declared, the declaration shall establish the borders of the zone of conflict and the period for which the declaration applies; announcement of the declaration shall be published in Reshumot.

d) Where a written notice was given pursuant to Article 5A(2) (in this article – written notice), the following provisions shall apply:

   (1) Where the Minister of Defense declared the area in which the damages were sustained a zone of conflict – a notification of the declaration shall be provided to the person who submitted the written notice within 30 days from the day the written notice was received at the Ministry of Defense;

   (2) Where the Minister of Defense did not declare the area in which the damages were sustained a zone of conflict – he may, within 90 days from the day the written notice was received, declare the area a zone of conflict; where such a declaration is made, he shall so inform the person who submitted the written notice within the said 90-day
period; where the Minister of Defense declared the area as aforesaid following the expiration of the said 90-day period, the court may, for special reasons that it shall record, accept the claim that the damages that are the subject of the written notice were sustained in a zone of conflict;

(3) The failure to inform a person who gave written notice that the area has been declared a zone of conflict, as stated in paragraphs (1) and (2), shall not affect the validity of the declaration pursuant to sub-article (c);

(4) The Minister of Defense, upon consultation with the Minister of Justice, shall establish the manner of informing a person who gave written notice that an area has been declared a zone of conflict.

(e) In this article –

“zone of conflict” means an area outside the territory of the State of Israel which the Minister of Defense declared a zone of conflict, as set forth in sub-article (c), where security forces were active or remained in the zone in the framework of the conflict.

“the State” includes an authority, body, or person acting on its behalf;

“conflict” means a situation in which an act or acts of a military nature are taking place between the security forces and regular or irregular entities hostile to Israel, or a situation in which enemy acts carried out by an organization hostile to Israel are taking place

5D. **Change in annexes by order**

The Minister of Defense, after consulting with the Minister of Justice, and with the approval of the Knesset’s Constitution, Law and Justice Committee, may change by order the First Annex and the Second Annex.

2. **Addition of article 9A**

After article 9 in the principal law, shall come:

9A. **Preservation of laws**

The provisions of articles 5B and 5C shall not derogate from any defense, immunity, or exemption, given to the State of Israel by any law.

3. **Provisions on commencement and applicability**
(a) The provisions of articles 5B to 5D of the principal law, in their wording in article 1 in this law, shall apply to an act that took place on 29 Elul 5760 (29 September 2000) and thereafter, except for an act as to which a claim was filed and the hearing of evidence thereon began prior to the time of publication of this law.

(b) For a period of six months from the day of publication of this law, the Minister of Defense may, notwithstanding the provisions of article 5C(d), declare an area a zone of conflict for the period from 29 Elul 5760 (29 September 2000) until the publication of this law.

4. **Obligation to appoint the first committee and making of initial rules**

(a) The first Committee pursuant to article 5C(b) of the principal law in its wording in article 1 of this law shall be appointed within 60 days from the day of publication of this law.

(b) The initial rules pursuant to article 5C(b)(3) of the principal law in its wording in article 1 of this law shall be presented for the approval of the Knesset’s Constitution, Law and Justice Committee within 60 days from the day of publication of this law.
First Annex  
(Article 5B(a))

A claim the cause of which is injury sustained to a person as stated in article 5B(a) while he was in custody of the State of Israel as a detainee or prisoner and who, after being in custody, did not return to be active in, or a member of, a terrorist organization or to act on behalf of such or as an agent thereof.

Second Annex  
(Article 5C(a))

1. A claim the cause of action of which is injury sustained as a result of an act done by a person serving in the security forces, provided that the said person was convicted of an offense for the said act by a conclusive judgment in a military tribunal or court in Israel; in this matter “offense” excludes an offense that is of the kind of offenses for which strict liability applies (within the meaning of articles 22 of the Penal Law, 5737-1977); in claims pursuant to this sub-article, regarding the period of limitation for filing a claim, as stated in article 5A(3), the day of the act that is the subject of the claim is the day on which the judgment is rendered final.

2. A claim the cause of action of which is injury sustained in a zone of conflict by a person who was in the custody of the State of Israel as a detainee or prisoner and who, after being in custody, did not return to be active in, or a member of, a terrorist organization or to act on behalf of such or as an agent thereof.

3. A claim the cause of action of which is the act of the Civil Administration within its meaning in Hqq Yissum ha-Heskem bidvar Rez'at Azza we-Ezor Yeriho (Hesderim Kalkaliyyim we-Hora'ot Shonot) (Tiqqune Haqiqa) [the Implementation of the Agreement on the Gaza Strip and the Jericho Area (Economic Arrangements and Miscellaneous Provisions) (Legislative Amendments) Law], 5795 - 1994; or an act of the Government, Coordination and Liaison Administration provided it is done outside the framework of conflict.

4. A traffic accident within its meaning as in Hqoq ha-Pizzuyim le-Nifge'e Te'unot Derakhim [the Compensation of Victims of Traffic Accidents Law], 5735 – 1975, in which a vehicle of the security forces is involved, the registration number of which or the identity of the driver of the vehicle at the time of the accident is known, except

3 Sefer ha-Huqqim 5737 [1977], p. 322.  
4 Sefer ha-Huqqim 5755 [1994], p. 326.  
5 Sefer ha-Huqqim 5735 [1975], p. 234.
where the accident occurred incidental to operational activity of the vehicle or to the hostile action of the injured person against the state or against the civilian population;

5. Property damages caused to a vehicle following a traffic accident within its meaning as in the Compensation of Victims of Traffic Accidents Law, 5735 – 1975, even if bodily injury was not sustained in the said accident, provided that the other conditions set forth in article 4 in this annex are met.
UPDATE:

NO REPARATIONS IN ISRAEL FOR PALESTINIANS:

HOW ISRAEL’S AMENDMENT NO. 8 LEAVES NO ROOM FOR RECOURSE

GAZA
JULY 2015
UNWILLINGNESS: NO DOMESTIC REMEDIES IN ISRAEL

In 2015, substantial evidence shows that Israel is unwilling to grant access to its courts for Palestinians from Gaza to seek reparation. For claimants from Gaza, there are no domestic remedies to speak of.

Since the beginning of the second Intifada in 2000, the Israeli legislature, the Israeli military, and the Israeli courts have set several procedural requirements and obstacles that effectively deny Palestinians their right to an effective civil remedy for alleged violations of international humanitarian law (IHL) and/or international human rights law (IHRL). This includes violations that may amount to war crimes and that led to severe casualties and damages.

Also since 2000, the practice of the Israeli Military Advocate General (MAG) has been largely to deny opening criminal investigations into the killing and injury of Palestinian civilians unless an internal investigation by a military commander discovered suspicions of criminal responsibility. Although the MAG narrowed the application of this policy in the West Bank, it still applies to deaths and other damages suffered by civilians in the Gaza Strip due to attacks by the Israeli forces that seem to have violated IHL and/or IHRL.

As a result of this framework, Palestinians living in Gaza, who are killed, injured or have their property damaged by Israeli military actions, have no access to effective remedy for their damages, and the Israeli military is not held accountable for alleged violations of international law.

This brief, while necessarily touching on issues with the MAG, will focus on the obstacles to bringing civil claims in front of Israeli courts, against this general backdrop of lack of access to justice. There is a second briefing by Al Mezan as an update at this time details Israel’s systematic impunity through the MAG.

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1 See Yesh-Din, Exceptions, Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007 (September 2008) pp. 19-23; Yesh-Din, MPCID Investigations into the Circumstances surrounding the Death of Palestinians Convictions and Penalties (Data sheet, July 2013), both available at http://www.yesh-din.org/prodcat.asp?prodcatid=1&topicid=2&typeid=0 (last visited on 12 March 2014). According to figures forwarded to Yesh Din by the IDF Spokesperson, during the period 2003-2012 the Israeli military police opened over 179 criminal investigations concerning suspicion of the unlawful killing of Palestinian civilians by IDF soldiers; Only 16 investigation files opened from September 2000 through mid-2013 regarding incidents in which Palestinians civilians were killed led to indictments. In that period, some 5,000 Palestinians, including approximately 1,000 minors under the age of 18, have been killed by Israeli forces in occupied Palestine.

2 See ‘Update: Briefing on Israeli investigations into criminal complaints submitted by Palestinian NGOs in Gaza on behalf of victims of attacks on Gaza in July and August 2014’, available online at http://mezan.org/en/post/20953
Amendment No. 8 to the Israeli Torts (State Liability) Law is the primary legal obstacle currently faced by Palestinian victims in the Gaza Strip when bringing civil claims before Israeli courts. Amendment 8 was passed into law by the Israeli Knesset on 16 July 2012, with retroactive application to 12 September 2005, and gives courts the power to dismiss civil cases at the preliminary stage, without hearing witnesses or considering evidence, if the damage for which the claim was submitted occurred as a result of the Israeli military’s ‘combat action’.

The amendment also expanded the definition of a ‘combat action’ to any warfare operation, “including any action against terrorism, hostilities, or uprising, and any preventative action against terrorism, hostilities, or uprising that is combatant in nature, considering all circumstances, including the action’s purpose, geographic location, or the threat to the operation forces.”

Amendment 8 fails to distinguish legitimate military actions from negligent executions of military operations to suspected war crimes, and enables the State and the Israeli military to evade its legal obligation under international law to provide reparation and compensation for the damages resulting from its operations in Gaza.

The restrictions on freedom of movement due to Israel’s closure policy of Gaza means that lawyers living in Israel that are hired by Palestinians from Gaza are not permitted to enter the Gaza Strip to meet their clients, take witness statements or collect and verify relevant evidence. Nor can the Palestinian clients go to Israel to meet the lawyers and attend court hearings. As a result, the lawyers meet difficulties in collecting the evidence necessary for building the legal case against the Israeli military. In addition, since June 2007, the Israeli military has refused permission to Palestinians involved in civil cases to appear in court and testify, despite the issuance of court orders. This results in the effective dismissal of such cases, and the absolute denial of justice.

The Israeli State does not take reasonable measures to overcome these procedural obstacles to access to justice. Consequently, many cases are dismissed by the Israeli courts. Palestinian victims are deprived from effective representation, from accessing justice and are ultimately denied their right to an effective remedy, which is guaranteed under international law. On 16 December 2014, Israel’s Supreme Court rejected a petition submitted by Adalah, Al Mezan and other NOGs against Israel’s policy of preventing the claimants and witnesses from entering Israel to attend their court hearings.

The authorization of official documents, including powers of attorney, inheritance and death certificates, medical reports of injuries and other court-required papers, must be carried out within Israel; authentications done by Palestinian government institutions or validated by Palestinian lawyers are considered invalid. An example of the serious difficulties that this poses is the consideration that due to Israel’s closure/blockade policy of Gaza, claimant from Gaza must hire a lawyer in Israel to take the case in

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3 Article 5 of the Israeli Torts (State Liability) Law, as amended in 2012. For more details see Adalah Center and others position paper at: [http://adalah.org/features/compensation/positionpaper-e.pdf](http://adalah.org/features/compensation/positionpaper-e.pdf), last visited on 8 November 2013.

4 Article 1 of the Torts (State Liability) Law, as amended in 2012, unofficial translation.
court; yet the claimant is not able to access the court in Israel in order to sign over the necessary power of attorney. As recently as May 2015, Al Mezan's request for permits for a family (with an ongoing law suit in Israel) to access Erez crossing and meet with their lawyer was rejected by the Israeli authorities. As a result, the case could be dismissed on the grounds that the powers of attorney will not be signed in the presence of the Israeli lawyer representing the victims.

The restrictive statute of limitations requirements in accordance with the Israeli Torts (State Liability) Law, stipulate that any non-Israeli victim suffering damages as a result of the Israeli military’s 'combat action' in occupied Palestine must submit a complaint to the Israeli Ministry of Defence within 60 days of the incident if they wish to reserve the right to file a civil claim within two years. If such a claim is not submitted, in most cases, the victim loses the right to access the Israeli courts and can no longer demand effective remedy for their damages.\(^5\) Importantly, the period of limitation of most other civil claims submitted to the Israeli courts is seven years, and no preliminary complaints are required.

The court guarantee that Israeli courts require each individual victim to pay is, on average, the equivalent of EUR 5,000. It is required to open a case and is paid to offset the State of Israel's 'defence costs' if the court does not rule in favour of the victims. Israel justifies this court expense as applicable to all foreign nationals and as a legitimate measure to ensure that legal costs are covered in the event that the claimant is unsuccessful. However such a blanket rule constitutes an obstacle to justice for foreign nationals in financial hardship with serious claims against the actions of the Israeli state, and presents an undue burden to Palestinians, who are considered foreign nationals but are under Israel's effective control and affected by Israel's actions on a daily basis.

\(^5\) Article 5A of the Torts (State Liability) Law.
**ALLEGATIONS: PAST AND PRESENT CASES MEET AMENDMENT 8**

**PAST: THE SALHA FAMILY**

Fayez Salha sought reparations and legal remedy in Israel after a devastating attack in 2009 where Israeli forces killed his wife, four of his children, and his sister-in-law. In the middle of the night the house was struck by a ‘roof knock warning’ missile. A few minutes later, as the family was frantically evacuating the home, Israeli forces targeted the home with a large missile that destroyed the house and killed most of the inhabitants.

In 2009, following the submission of a compensation claim by Al Mezan on behalf of the family, the judge acknowledged wrongdoing in the actions of the Israeli military forces; however, in line with amendment 8, and without analyzing the nature or legality of the attacks, he dismissed the case and rejected liability on the part of Israel. Having failed the ‘combat action’ test, on Thursday 7 February 2013, Israel’s central court of Beersheba dismissed the case and ordered the claimant to pay a 20,000 ILS fee (approximately 5,000 EUR) as the court guarantee.

**PRESENT: ABU IS’AYID FAMILY**

On a July evening in 2010, the Abu Is’ayid family suffered a deadly attack by Israeli forces on their home in Gaza’s access restricted area (also referred to as the ‘buffer zone’) near the border between Gaza and Israel. The family, who work in agriculture and have lived on and farmed the land for generations, underwent a second devastating attack by Israeli forces just over one year later.

Seeking justice and accountability for the attacks on their home that resulted in the death of mother of five, Ne’ma Yousif Abu Is’ayid, and the destruction of the family home, the Abu Is’ayid family initiated the legal process before the Israeli District Court in Beersheba, Israel, and with Israel’s military investigative mechanisms. Shockingly, in the context of Israel’s 2014 full-scale military operation on Gaza, the family was attacked a third time. Their new house was destroyed and the bodies of their dead livestock quickly buried.

The Abu Is’ayid family submitted a complaint to the Israeli Ministry of Defence within the required, restrictive, timeframe of 60 days. Initial administrative investigations were opened into both incidents. The outcome of the internal Israeli military investigation into the 2010 incident was communicated on 1 June 2015 and acknowledged as delayed beyond acceptable standards. The outcome stated that the attack was carried out in the context of ‘combat action’ and therefore did not merit a criminal investigation. This suggests that the prosecution is expected to ask the court to dismiss the case on the grounds that the damages and injuries occurred in the context of ‘combat action’, as per amendment 8. That is if the case makes it beyond the current administrative barriers. Regarding the 2011 attack, Israel’s MAG stated that technical difficulties occurred as Israeli forces saw a suspicious person approaching the border fence; the case was closed without a criminal investigation. There was no clarification as to what the ‘technical difficulties’ involved.

Meanwhile, on 11 July 2012, before the expiry of the two-year statute of limitations, the Abu Is’ayid family initiated legal proceedings before the Israeli District Court in Beersheba with support from Al Mezan, asking for compensation for the damages suffered by the family as a result of the first (2010) incident. The
defendant, the State of Israel, submitted a statement, claiming that the incident took place during 'combat action', which would exempt the State of Israel of any legal liability according to amendment 8, and requested that the court therefore dismiss the case.

On 4 February 2013, the court issued a decision for the claimants, the Abu Is’ayid family, to pay a court guarantee of ILS 20,000 (equal to approximately EUR 5,000) before the civil case could proceed; an amount that exceeded the financial capabilities of the victims. The family’s lawyer asked the court to exempt his clients from paying the court guarantees due to his clients’ financial situation. The court rejected the request. Al Mezan exceptionally decided to pay the court guarantees to allow for the case to continue.

During the court session of 8 April 2013, the defence lawyers for the State of Israel repeated their position, asking the court to drop the case in accordance with amendment 8. The claimant’s lawyer objected and maintained that there are no indications that the incident took place during ‘combat action’. He asked the court to examine the evidence and witnesses provided by both parties. He also requested that the court grant him more time to prepare the case, pointing out the anticipated difficulties of conducting meetings with the victims and the witnesses in Gaza without being able to travel there.6

In the subsequent hearing, the claimant was asked to present original powers of attorney forms - signed before him in court by the claimants and the lawyer. Other documentation, such as inheritance certificates, should also be approved by the Israeli Judicial Coordination Office (JCO) otherwise, the case would be dismissed, the judge decided.

The claimant’s lawyer approached the JCO to approve the documents produced in Gaza by the justice system. However, the JCO rejected the request and the documents were not approved on the grounds that the documents were produced in Gaza. The lawyer subsequent attempt to secure a permit to meet the clients in Erez crossing for the signing of the documents was rejected.

The claimant’s lawyer is currently appealing this decision within administrative bodies in Israel. Without the official court-required documents signed in Israel, the Abu Is’ayid’s case will most likely fail. Even if the permits are issued for lawyer and client to meet in Erez crossing, according to a record of zero permits granted for witnesses to access courts in six years, it is likely that the claimant would not appear in court and the case would at that point be dismissed. The last, insurmountable test would be amendment 8. Even if the case is jeopardized by the test of ‘combat action’ under amendment 8, it will most likely be thrown out of court for failing to surmount the barriers within this piece of legislation.

CONCLUSION

The Report of the detailed findings of the independent commission of inquiry on the 2014 Gaza conflict demonstrates that tens of thousands of Palestinians suffered injuries and damages due to actions that the

6 According to the documents received from the family’s lawyer, Hussien Abu Hussien, and an interview with Al Mezan Center for Human rights on 6 November 2013.
Commission of Inquiry (COI) report deemed unlawful and likely amounting to war crimes. The Report further cited the need for accountability. However, Gaza residents have no hope of achieving accountability or accessing reparations in Israel. As the briefing on criminal investigations enclosed here details, Israel’s justice system is capable of serving justice, however, the lack of will to investigate serious violations emanating from armed attacks is embedded in amendment 8 legislation; Israel unwilling.

There is no hope for justice and redress in Israel. Amendment 8 is legislative reform that institutionalizes the denial of Palestinian access to justice in Israel. Without access to redress in Israel Palestinian claimants from Gaza have no other option but to push for legal remedy from international justice mechanisms.

Compelling evidence is put forward in the conclusions of previous mechanisms set up by the UN Human Rights Council, including the Committee of Experts that followed up the quality of investigations after Operation Cast Lead, that determines that domestic remedies are improper and not to international standards. The conclusions point to the use of international mechanisms, including the International Criminal Court and the need for support of the Office of the Prosecutor and ensuring its unimpeded access. The support of the competent ICC Prosecutor’s on-going preliminary examination within this context is critical. In this context of impunity, and following three major bombardments in six years, accountability bears even greater significance in ensuring better protection of civilians in this on-going conflict.